(15)

No. 05-7664
Title: Reymundo Toledo-Flores, Petitioner
v.
United States
Docketed: November 21, 2005
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (04-41378)
Decision Date: August 17, 2005
Questions Presented

| ~~Date~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~

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Sep 5 2006	Record recevied from U.S.D.C. for Southern District of Texas. (1 envelope)
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Oct 3 2006	Argued. For petitioner Lopez: Robert A. Long, Jr., Washington, D.C. For petitioner Toledo-Flores: Timothy Crooks, Houston, Tex. For respondents: Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C.

ORIGINAL

NO. 05-7664

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
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REYMUNDO TOLEDO-FLORES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED

Has the Fifth Circuit erred in holding - in opposition to the Second, Third, Sixth, and Ninth Circuits - that a state felony conviction for simple possession of a controlled substance is a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) and hence an "aggravated felony," under 8 U.S.C. § 1101(a)(43)(B), even though the same crime is a misdemeanor under federal law?

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PRAYER

The petitioner, Reymundo Toledo-Flores, respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on August 17, 2005.

OPINIONS BELOW

On August 17, 2005, the United States Court of Appeals for the Fifth Circuit issued its opinion affirming the judgment of the district court. See United States v. Toledo-Flores, No. 04-41378, 2005 WL 1995615 (5th Cir. Aug. 17, 2005) (unpublished). A copy of that opinion is attached as Appendix A.

The judgment of conviction and sentence of the district court is attached as Appendix B. The district court did not issue any written opinions.

JURISDICTION

On August 17, 2005, the United States Court of Appeals for the Fifth Circuit issued its judgment and opinion affirming the judgment of the district court. See United States v. Toledo-Flores, No. 04-41378, 2005 WL 1995615 (5th Cir. Aug. 17, 2005) (unpublished) (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND GUIDELINES INVOLVED

At issue in this petition is the portion of the definition of the term "aggravated felony" found in 8 U.S.C. § 1101(a)(43)(B):

> (43) The term "aggravated felony" means-
>
> . . .
>
> (B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);
>
> . . . .

8 U.S.C. § 1101(a)(43)(B).

In turn, 18 U.S.C. § 924(c) defines the term "drug trafficking crime" as "mean[ing] any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." 18 U.S.C. § 924(c)(2).

Also at issue in this petition is Section 2L1.2 of the United States Sentencing Guidelines, which provides:

> **§ 2L1.2. Unlawfully Entering or Remaining in the United States**
>
> (a) Base Offense Level: 8
>
> (b) Specific Offense Characteristic
>
> (1) Apply the Greatest:
>
> If the defendant previously was deported, or unlawfully remained in the United States, after --
>
> . . .
>
> (C) a conviction for an aggravated felony, increase by 8 levels;

. . .

USSG § 2L1.2.

The commentary to USSG § 2L1.2 provides in pertinent part that, "[f]or purposes of subsection (b)(1)(C), 'aggravated felony,' has the meaning given that term in 8 U.S.C. § 1101(a)(43) without regard to the date of conviction of the aggravated felony." USSG § 2L1.2, comment. (n.2).

STATEMENT OF THE CASE[1]

A. Course of Proceedings.

On March 16, 2004, a federal grand jury in the Laredo Division of the Southern District of Texas returned a one-count indictment charging the petitioner, Reymundo Toledo-Flores ("Mr. Toledo-Flores"), with felony illegal entry into the United States, in violation of 8 U.S.C. § 1325. (R 1: 7) The offense was alleged to have occurred "[o]n or about February 22, 2004." (R 1: 7)

On May 3, 2004, Mr. Toledo-Flores entered a plea of guilty to the indictment before United States District Judge George P. Kazen. (R 1: 11; R 2: 6)

On September 9, 2004, the district court sentenced Mr. Toledo-Flores to twenty-four months' imprisonment in the custody of the Federal Bureau of Prisons;[2] a one-year term of supervised release; and a mandatory special assessment of $100. The district court did not order a fine. (R 1: 17-22 [judgment]; R 3: 5-6 [transcript of oral pronouncement of sentence])

On September 16, 2004, Mr. Toledo-Flores filed a timely notice of appeal to the United States Court of Appeals for the Fifth

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[1] All references are to the record as it was constituted on appeal to the United States Court of Appeals for the Fifth Circuit. The Record on Appeal is cited as follows: (R [volume number]: [page number]). The Presentence Report ("PSR") is cited as follows: "PSR, ¶ [paragraph number]."

[2] This sentence was ordered to run consecutively to a six-month prison sentence imposed upon revocation of probation in another case, for a total prison sentence of thirty months. (R 3: 5) The revocation and six-month sentence are not at issue in this petition.

Circuit. (R 1: 23-24) On August 17, 2005, the United States Court of Appeals for the Fifth Circuit issued its judgment and opinion affirming the judgment of the district court. See United States v. Toledo-Flores, No. 04-41378, 2005 WL 1995615 (5th Cir. Aug. 17, 2005) (unpublished) (Appendix A).

B. Statement of Relevant Facts.

1. The Offense.

The prosecutor offered the following oral recitation of facts to supply the factual basis at Mr. Toledo-Flores's rearraignment/guilty plea proceeding:

> Judge, the defendant is a native and citizen of Mexico with no documents to enter or pass through or remain in the United States.
>
> The defendant was apprehended by the U.S. Border Patrol on the 23rd of February of near [sic] the Benitez County fence line near the 16-mile marker of I-35 north of Laredo, Texas.
>
> At the time he was arrested[,] the defendant admitted that he had last entered the United States illegally from Mexico by wading the Rio Grande River near the World Trade Bridge on the 22nd of February of 2004[,] and he waded the river and entered the United States at a place other than that designated by immigration officials as a port of entry.
>
> The defendant was last convicted of illegal entry on the 17th of November of 2000 in Del Rio, Texas.

(R 2: 14-15)

2. The Sentencing.

After Mr. Toledo-Flores's plea of guilty, the district court ordered that a presentence report ("PSR") be prepared to assist the court in sentencing Mr. Toledo-Flores. (R 1: 12) The Probation

Office began with a base offense level of eight, see PSR, ¶ 9, and then enhanced that base offense level eight levels pursuant to USSG § 2L1.2(b)(1)(C), on the ground that Mr. Toledo-Flores's 2002 Texas felony conviction for simple possession of 0.16 grams of cocaine[3] was an "aggravated felony." See PSR, ¶ 10. As a consequence, Mr. Toledo-Flores had an adjusted offense level of sixteen, see PSR, ¶ 14, and, after a three-level reduction for acceptance of responsibility, see PSR, ¶ 15, a total offense level of thirteen. See PSR, ¶ 16. With Mr. Toledo-Flores's Criminal History Category of VI, see PSR, ¶ 30, this produced a Guideline imprisonment range of thirty-three to forty-one months. See PSR, ¶ 49. However, because this range exceeded the two-year maximum authorized by 8 U.S.C. § 1325, the Guidelines range became the two-year (twenty-four month) maximum. See PSR, ¶¶ 48-49.

Mr. Toledo-Flores objected to the PSR's characterization of his 2002 simple possession conviction as an "aggravated felony." See Defendant's Response to the Presentence Report, at 1-2; see also PSR Addendum, at 14A. He renewed that objection at the sentencing hearing. (R 3: 5) The district court, however, overruled the objection and sentenced Mr. Toledo-Flores to twenty-four months' imprisonment. (R 3: 5)

3. The Appeal.

On appeal, Mr. Toledo-Flores renewed his argument that "his Texas state conviction for possession of cocaine is not a

[3] This conviction is set forth at paragraph 24 of the PSR.

qualifying aggravated felony because it is not a felony under the federal Controlled Substances Act." Toledo-Flores, No. 04-41378, slip op. at 1-2, 2005 WL 1995615, at *1. The Fifth Circuit, however, rejected this contention on the basis of its long-standing precedent:

> Our precedent is clear that Congress has made a "deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only a misdemeanor under the [Controlled Substances Act]." United States v. Hernandez-Avalos, 251 F.3d 505, 510 (5th Cir. 2001) (internal quotation marks and citation omitted). A prior conviction for a state drug offense will qualify as an aggravated felony under U.S.S.G. § 2L1.2(b)(1)(C) if it is punishable under the Controlled Substances Act and it is punishable by more than a year of imprisonment under the applicable state law. See United States v. Sanchez-Villalobos, 412 F.3d 572, 576 (5th Cir. 2005). Toledo's prior offense meet this definition. See 21 U.S.C. § 844(a); TEX. HEALTH AND SAFETY CODE ANN. §§ 481.102(3)(D) & 481.115 (Vernon 2001); TEX. PENAL CODE ANN. § 12.35(a) (Vernon 2001). Accordingly, the judgment of the district court is AFFIRMED.

Toledo-Flores, No. 04-41378, slip op. at 2, 2005 WL 1995615, at *1.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This case was brought as a federal criminal prosecution under 8 U.S.C. § 1325. The district court therefore had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve the circuit split as to whether a state felony conviction for simple possession of a controlled substance is a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) and hence an "aggravated felony," under 8 U.S.C. § 1101(a)(43)(B), even though the same crime is a misdemeanor under federal law.

A. Introduction.

Under 8 U.S.C. § 1101(a)(43), "[t]he term 'aggravated felony' means - (B) illicit trafficking in a controlled substance (as defined in [21 U.S.C. § 802], including a drug trafficking crime (as defined in [18 U.S.C. § 924(c)]) . . . ." 8 U.S.C. § 1101(a)(43)(B). And, under 18 U.S.C. § 924(c), "the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." 18 U.S.C. § 924(c)(2).

The question is whether, in order to count as a "drug trafficking crime" and thus an aggravated felony, a crime must be classified as a felony under the named federal statutes; or whether, on the other hand, it is sufficient that: (1) the crime is punishable under the named federal statutes (whether as a felony or as a misdemeanor); and (2) that it is punishable as a felony in the jurisdiction in which the conviction actually occurred. In the instant case, the Fifth Circuit, holding that its "precedent [was] clear" on the question, applied the latter approach. This body of

precedent grew out of the Fifth Circuit's first decision on this question, United States v. Hinojosa-Lopez, 130 F.3d 691 (5th Cir. 1997), in which the Fifth Circuit held that a state felony conviction for simple possession of a controlled substance was a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) and thus an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B), notwithstanding the fact that the same simple possession crime would be only a misdemeanor under federal law. See Hinojosa-Lopez, 130 F.3d at 693-94.

Presented in the context of this case, the question is whether Mr. Toledo-Flores's 2002 Texas state felony conviction for simple possession of 0.16 grams of cocaine - a misdemeanor under federal law - should nonetheless qualify as an "aggravated felony" because it was classified as a felony under Texas state law. As will be demonstrated, the circuits are divided on this question, and the Board of Immigration Appeals has furthered the disparity created by the circuit split by simply deferring to the view of the particular circuit in which the immigration proceedings occur. Furthermore, the majority rule is in tension with the general rule - enunciated by this Court in Jerome v. United States, 318 U.S. 101 (1943) - that federal criminal statutes should not be construed so as to make their application dependent upon the vagaries of the laws of the various states.

B. The Circuits Are Divided.

"The issue presented is whether a state conviction for possession [of a controlled substance] can ultimately qualify as an aggravated felony . . . if it is a felony under the applicable state law but is punishable only as a misdemeanor under the Controlled Substances Act (CSA), 21 U.S.C. § 801 et seq." United States v. Wilson, 316 F.3d 506, 512 (4th Cir.), cert. denied, 123 S. Ct. 1959 (2003). The Fifth Circuit, following its precedent,[4] answered that question in the affirmative in this case. The First, Fourth, Eighth, Tenth, and Eleventh Circuits have, in various decisions, agreed with the Fifth Circuit.[5]

The Second, Third, Ninth, and most recently the Sixth, Circuits have, however, reached a contrary result. In Aguirre v. INS, 79 F.3d 315, 317-18 (2d Cir. 1996), the Second Circuit, in the interest of the uniform national application of immigration law, abandoned its prior precedent in Jenkins v. INS, 32 F.3d 11 (2d Cir. 1994), and held that the petitioner's prior state felony conviction for possession of a controlled substance should not be considered a "drug trafficking crime" under 18 U.S.C. § 924(c) or

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[4] See, e.g., United States v. Rivera, 265 F.3d 310, 312-13 (5th Cir. 2001), cert. denied, 534 U.S. 1146 (2002); United States v. Hernandez-Avalos, 251 F.3d 505, 508 (5th Cir.), cert. denied, 534 U.S. 935 (2001); Hinojosa-Lopez, 130 F.3d at 693-94.

[5] See Wilson, 316 F.3d at 512, 514 (4th Cir.); United States v. Simon, 168 F.3d 1271, 1272 (11th Cir.), cert. denied, 528 U.S. 844 (1999); United States v. Briones-Mata, 116 F.3d 308, 309 (8th Cir. 1997); United States v. Cabrera-Sosa, 81 F.3d 998, 1000 (10th Cir.), cert. denied, 519 U.S. 885 (1996); United States v. Restrepo-Aguilar, 74 F.3d 361, 364 (1st Cir. 1996).

an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B). The Third Circuit agreed and held that "a state felony drug conviction without a trafficking element constitutes an 'aggravated felony' under the [Immigration and Nationality Act] only when that same crime would be punished as a felony were the alien prosecuted in federal court . . . ." Gerbier v. Holmes, 280 F.3d 297, 300 (3d Cir. 2002); see also id. at 302-12.[6]

More recently, the Ninth Circuit has held that "a state drug offense is an aggravated felony for immigration purposes only if it would be punishable as a felony under federal drug laws or the crime contains a trafficking element." Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905, 912 (9th Cir. 2004); see also id. at 910-18. The Ninth Circuit found this result compelled by "[t]he presumption that immigration laws should be interpreted to be nationally uniform, evidence that Congress intended uniformity, and prudential concerns." Id. at 912; see also id. at 912-18. The Ninth Circuit thus found that "because Cazarez-Gutierrez's offense, possession of methamphetamine,[7] is not punishable as a felony under federal law and involves no trafficking element, the BIA erred in concluding that Cazarez-Gutierrez is statutorily

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[6] The Third Circuit has labeled this the "hypothetical federal felony" approach. See id. at 304 (citing United States v. Graham, 169 F.3d 787, 789 (3d Cir.), cert. denied, 528 U.S. 845 (1999)).

[7] Much like the situation presented in this case, "[i]n January 1997, Casarez-Gutierrez was convicted by the State of Arizona of possession of methamphetamine, a felony under Arizona law . . . [but] not a felony under federal law." Id. at 908 (citations omitted).

ineligible for cancellation of removal because of an aggravated felony conviction." Id. at 918.

Most recently, in United States v. Palacios-Suarez, 418 F.3d 692 (6th Cir. 2005), the Sixth Circuit examined this same question in the context of the application of the Federal Sentencing Guidelines in a criminal case. After a detailed analysis of the statutory language, the panel majority concluded that it "c[ould]not say that the plain meaning of the language of [18 U.S.C.] § 924(c)(2) supports one interpretation over another," and therefore resort to the legislative history was necessary. Id. at 698. After examining the legislative history, the panel majority "conclude[d] that the legislative history of [8 U.S.C.] § 1101(a)(43) confirms the interpretation that Congress did not intend for state felony convictions (not involving any element of drug trafficking) to qualify as an "aggravated felony" under § 1101(a)(43)(B) if the offense would be punishable only as a federal misdemeanor under the [federal Controlled Substances Act]." Id. at 700.

Judge Nelson concurred. See id. at 701-02 (Nelson, J., concurring). He agreed that the statutory language was ambiguous, but disagreed that the legislative history provided any clarification. See id. at 702 (Nelson, J., concurring). He would, instead, have reached the same result by application of the rule of lenity. See id. (Nelson, J., concurring).

The Second, Third, Ninth, and Sixth Circuits have thus interpreted the relevant statutes in complete opposition to the

interpretation given to those same statutes by the First, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits. To be sure, Aguirre, Gerbier, and Cazarez-Gutierrez are immigration cases rather than criminal cases.[8] That, however, should make no difference to the analysis of the statutes involved. As the Fifth Circuit has rightly observed, there is no justification for "interpreting th[e relevant] statute differently based on [a] distinction between sentencing and immigration cases; it is, after all, the same words of the same phrase from the same statute that is being interpreted in each instance."[9] Hernandez-Avalos, 251 F.3d 505 at 509; accord

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[8] In fact, both the Second Circuit and the Ninth Circuit have issued contrary decisions ***on the same question of law*** in the criminal context. See United States v. Pornes-Garcia, 171 F.3d 142, 145 (2d Cir.), cert. denied, 528 U.S. 880 (1999); United States v. Ibarra-Galindo, 206 F.3d 1337, 1339 (9th Cir. 2000), cert. denied, 531 U.S. 1102 (2001); but see Ibarra-Galindo, 206 F.3d at 1341-45 (Canby, J., dissenting). The Third Circuit likewise appears to have left open the possibility that the question could be resolved differently in a criminal case. See Gerbier, 280 F.3d at 307.

[9] Moreover, the state of the law is such that there is as much division of opinion, and confusion, in the immigration context as in the criminal law context. The Board of Immigration Appeals ("BIA") had once also held that felony simple possession of a controlled substance was not a "drug trafficking crime," and hence not an "aggravated felony." See Matter of K-V-D-, Int. Dec. 3422, 1999 WL 1186808 (BIA Dec. 10, 1999) (en banc); Matter of L-G-, 21 I. & N. Dec. 89 [1995 WL 582051] (BIA 1995) (en banc). However, the BIA subsequently issued an opinion abjuring its own independent interpretation of the statutes at issue here and decreeing that, henceforth, immigration courts should simply follow the law of the circuit in which the immigration proceeding is being held, or, if that circuit has not ruled, then the majority view. See Matter of Yañez-Garcia, 23 I. & N. Dec. 390, 396-98 [2002 WL 993589] (BIA 2002) (en banc); but see id. at 402-18 (Rosenberg and Espenoza, Board Members, concurring in part and dissenting in part). The BIA's decision in Yañez-Garcia thus multiplies the disparities arising from the division in the federal circuits.

Palacios-Suarez, 418 F.3d at 697 ("agree[ing] with the Fifth Circuit's reasoning [in Hernandez-Avalos] and declin[ing] to adopt separate interpretations of the same phrase for the immigration and sentencing cases"); see also Leocal v. Ashcroft, 125 S. Ct. 377, 383 n.8 (2004) (declining to interpret 18 U.S.C. § 16 differently in the immigration context than in the criminal law context "because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context . . . .").

This division in the federal circuits is, by itself, reason enough for this Court to grant certiorari. See Sup. Ct. R. 10(a). Because "[t]he statutory point is [at least] fairly debatable," Aguirre, 79 F.3d at 317, and because there are good and compelling reasons to adopt a view contrary to that taken by the Fifth Circuit in this case, see, e.g., Palacios-Suarez, 418 F.3d at 697-700 (majority opinion) & 701-02 (Nelson, J., concurring); Cazarez-Gutierrez, 382 F.3d at 910-18; Gerbier, 280 F.3d at 302-12; Ibarra-Galindo, 206 F.3d at 1341-45 (Canby, J., dissenting), this Court should grant certiorari in this case to decide this question.

C. The Majority Rule Is in Tension with this Court's Decision in *Jerome v. United States*, 318 U.S. 101 (1943).

There is, however, an additional reason why this Court should grant certiorari in this case, namely: that the majority rule is in tension with this Court's decision in Jerome v. United States, 318 U.S. 101 (1943). At issue in Jerome was the portion of the Bank Robbery Act providing that it was a crime to "enter or attempt

to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building or part thereof, so used, any felony or larceny . . . ." See Jerome, 318 U.S. at 101. The particular question was whether the utterance of a forged security - a felony under Vermont law, but not under any federal statute - could qualify as the "any felony" under this statute. See id. at 102.

This Court held that the term "any felony" did not incorporate felonies under state law. See id. at 104, 108. Of importance to this case, the Court noted that it "must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law." Id. at 104; see also United States v. Turley, 352 U.S. 407, 411 (1957) ("[I]n the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law.") (citing Jerome, 318 U.S. at 104; other citation omitted). The Court noted the "desirability of uniformity in application which supports the general principle." Jerome, 318 U.S. at 104.

Under the principles expressed in Jerome, there should be a presumption ***against*** making a simple possession offense an aggravated felony (or not) based solely upon how the offense is characterized in the particular state/jurisdiction in which the conviction occurred. In light of Jerome, it makes far more sense to hold that state law offenses are included only if they are

felonies under the referenced federal acts. Such a construction - i.e., the "hypothetical federal felony" approach, see Gerbier, 280 F.3d at 304 (citation omitted) - has the virtue of assuring the "uniformity in application" found to be "desirab[le]" in Jerome. In other words, a particular type of offense will always be counted (or not) irrespective of whether it is characterized as a felony or a misdemeanor by the jurisdiction in which the conviction occurred.

D. This Court Should Grant Certiorari in This Case.

The federal circuits are deeply divided on this important and recurring question of federal law. Moreover, the view espoused by petitioner here is supported by extremely strong reasoning. See, e.g., Palacios-Suarez, 418 F.3d at 697-700 (majority opinion) & 701-02 (Nelson, J., concurring); Cazarez-Gutierrez, 382 F.3d at 910-18; Ibarra-Galindo, 206 F.3d at 1341-45 (Canby, J., dissenting). By now, most of the federal circuits have weighed in on the question; therefore, further "percolation" would not materially advance this Court's ability to assess the merits of this question. Finally, this question is an extremely important one that courts confront daily, both in the criminal law context and in the immigration law context. For these reasons, this Court should grant certiorari in this case to decide this question.

CONCLUSION

For the foregoing reasons, the petitioner, Reymundo Toledo-Flores, respectfully prays that this Court grant certiorari to review the judgment of the Fifth Circuit.

Date:
November 15, 2005

Respectfully submitted,

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United States Court of Appeals
Fifth Circuit
FILED
August 17, 2005
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-41378
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

REYMUNDO TOLEDO-FLORES,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:04-CR-546-ALL

Before BENAVIDES, CLEMENT, and PRADO, Circuit Judges.

PER CURIAM:*

Reymundo Toledo-Flores (Toledo) appeals the two-year sentence imposed following his guilty-plea conviction for improper entry by an alien. Toledo argues that the district court erred by imposing the eight-level increase in U.S.S.G. § 2L1.2(b)(1)(C) (2003) for having a prior aggravated felony conviction. Toledo contends that his Texas state conviction for possession of cocaine is not a qualifying aggravated felony because it is not a felony under the federal Controlled

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX A

Substances Act. Although Toledo conceded before the district court that this argument was foreclosed by United States v. Rivera, 265 F.3d 310 (5th Cir. 2001), and United States v. Hinojosa-Lopez, 130 F.3d 691 (5th Cir. 1997), on appeal he asserts that these decisions are not binding because they conflict with Jerome v. United States, 318 U.S. 101 (1943).

Our precedent is clear that Congress has made a "deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only a misdemeanor under the [Controlled Substances Act]." United States v. Hernandez-Avalos, 251 F.3d 505, 510 (5th Cir. 2001) (internal quotation marks and citation omitted). A prior conviction for a state drug offense will qualify as an aggravated felony under U.S.S.G. § 2L1.2(b)(1)(C) if it is punishable under the Controlled Substances Act and it is punishable by more than a year of imprisonment under the applicable state law. See United States v. Sanchez-Villalobos, 412 F.3d 572, 576 (5th Cir. 2005). Toledo's prior offense meets this definition. See 21 U.S.C. § 844(a) (2003); TEX. HEALTH AND SAFETY CODE ANN. §§ 481.102(3)(D) & 481.115 (Vernon 2001); TEX. PENAL CODE ANN. § 12.35(a) (Vernon 2001). Accordingly, the judgment of the district court is AFFIRMED.

AO [illegible] Judgment in a Criminal Case
United States District Court
Southern District of Texas
FILED
SEP 10 2004
Michael N. Milby, Clerk
Laredo Division

United States District Court
Southern District of Texas
ENTERED
SEP 17 2004
Michael N. Milby Clerk
Laredo Division

UNITED STATES DISTRICT COURT

Southern District of Texas

Holding Session in Laredo

UNITED STATES OF AMERICA

V.

REYMUNDO TOLEDO-FLORES

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: **5:04CR00546-001**

USM NUMBER: 35331-179

Raul Martinez
Defendant's Attorney

☐ See Additional Aliases.

THE DEFENDANT:

☒ pleaded guilty to count(s) one on May 3, 2004

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
8 U.S.C. § 1325	Illegal entry (felony)	02/22/2004	One

☐ See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

September 9, 2004
Date of Imposition of Judgment

George P. Kazen
Signature of Judge

GEORGE P. KAZEN
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

9/10/04
Date

QIC/PEN/rf

APPENDIX B

DEFENDANT: **REYMUNDO TOLEDO-FLORES**
CASE NUMBER: **5:04CR00546-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 24 months.

The defendant was advised of the right to appeal the sentence, including the right to appeal in forma pauperis, upon proper documentation.

☐ See Additional Imprisonment Terms.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **REYMUNDO TOLEDO-FLORES**
CASE NUMBER: **5:04CR00546-001**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 1 year.

☐ See Additional Supervised Release Terms

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. *(for offenses committed on or after September 13, 1994)*

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

☒ See Special Conditions of Supervision.

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **REYMUNDO TOLEDO-FLORES**
CASE NUMBER: **5:04CR00546-001**

SPECIAL CONDITIONS OF SUPERVISION

If deported, the defendant is not to re-enter the United States illegally. If the defendant is deported during the period of probation or the supervised release term, supervision by the probation office becomes inactive. If the defendant returns, the defendant shall report to the nearest U.S. Probation Office immediately. Supervision by the probation officer reactivates automatically upon the defendant's reporting.

DEFENDANT: **REYMUNDO TOLEDO-FLORES**
CASE NUMBER: **5:04CR00546-001**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00		

☐ See Additional Terms for Criminal Monetary Penalties.

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

☐ See Additional Restitution Payees.

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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DEFENDANT: **REYMUNDO TOLEDO-FLORES**
CASE NUMBER: **5:04CR00546-001**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☒ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☒ in accordance with ☐C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ installments of $ _____ over a period of_____ , to commence _____ days after the date of this judgment; or

D ☐ Payment in equal _____ installments of $ _____ over a period of_____ , to commence _____ days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:
Make all payments payable to: U.S. District Clerk, P.O. Box 597, Laredo, TX 78042-0597

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ See Additional Defendants and Co-Defendants Held Joint and Several.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

☐ See Additional Forfeited Property.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

892

(14)

No. 05-7664

FILED
SEP 18 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

REYMUNDO TOLEDO-FLORES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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ARGUMENT

I. MR. TOLEDO-FLORES'S CASE IS NOT MOOT.

In its brief (Resp. Br. 10-13), the Government contends that Mr. Toledo-Flores's case is moot. The Government is mistaken.

Central to the Government's mootness argument is the implicit, and erroneous, distinction it draws between Mr. Toledo-Flores's "now-completed sentence" (Resp. Br. 11) and his "term of supervised release." Resp. Br. 11. Contrary to the Government's distinction, Mr. Toledo-Flores received ***one*** sentence that had both an imprisonment component and a supervised release component.[1] And, although Mr. Toledo-Flores has served the imprisonment component of that sentence, he is still subject to the supervised release component, notwithstanding his deportation from the United States.[2] The district court retains jurisdiction to modify the terms and conditions of that supervised release throughout the supervised release period, *see* 18 U.S.C. § 3583(e)(2); and it retains jurisdiction to revoke that supervised release and to reincarcerate Mr. Toledo-Flores even after the supervised release term is over, provided that a violation warrant or summons issues

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[1] "[S]upervised release, while a form of post-imprisonment supervision, is still considered to be a component of the defendant's total sentence." *United States v. Gonzalez*, 250 F.3d 923, 928 (5th Cir. 2001) (citations omitted); *see also* 18 U.S.C. § 3583(a) ("The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include ***as a part of the sentence*** a requirement that the defendant be placed on a term of supervised release after imprisonment * * * * ") (emphasis added).

[2] As every circuit to have considered the question has held, a defendant's term of supervised release is not extinguished by the defendant's deportation. *See, e.g., United States v. Williams*, 369 F.3d 250, 253 (3d Cir. 2004) (so holding and citing cases from the Second, Fifth, Seventh, and Ninth Circuits as in accord).

prior to the expiration of the supervised release term. *See* 18 U.S.C. § 3583(e)(3) & (i). Mr. Toledo-Flores is thus still subject to the sentence that was the subject of his appeal and his petition to this Court.[3]

This Court has never held that an appeal of a sentence may become moot before that sentence is completely discharged. In this regard, the Government's reliance (Resp. Br. 11-13) on *Spencer v. Kemna*, 523 U.S. 1 (1998), is misplaced. In *Spencer*, the petitioner had attacked, in a federal habeas corpus proceeding, a state parole revocation proceeding and the resulting sentence. That sentence, however, completely expired before the federal district court could rule on his petition. This Court held that "***[o]nce the convict's sentence has expired***, [] some concrete and continuing injury other than the now-ended incarceration or parole * * * must exist if the suit is to be maintained." *Id.* at 7 (emphasis added). Finding no such injury, the Court affirmed the finding of mootness. *See id.* at 14-16. The Court found that any residual effect of the moribund parole revocation and sentence on a future revocation or future criminal sentencing to be insufficient to establish the requisite injury. *See id.* at 14-15.

Here, unlike in *Spencer*, Mr. Toledo-Flores is contesting a sentence that is still in effect and from which he may still suffer direct consequences, not just collateral

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[3] The Government is wrong when it asserts (Resp. Br. 10) that "[t]he sole relief sought in [Mr. Toledo-Flores's] appeal and petition to this Court was a reduction in the length of his sentence of imprisonment." Rather, in the court below, Mr. Toledo-Flores argued that, as a consequence of the error at issue here, the Court of Appeals "should vacate Mr. Toledo-Flores's sentence and remand for resentencing." Pet. C.A. Br. 15 (footnote omitted); *see also* Pet. C.A. Reply Br. 6 (same). And, in this Court, Mr. Toledo-Flores asked this Court to "grant certiorari to review the judgment of the Fifth Circuit," Pet. Cert. 18 – a judgment that affirmed the judgment of conviction and sentence entered by the district court. *See* Pet. Cert. 20.

consequences as in *Spencer*. And, the relevant precedent of this Court establishes that an appeal of a sentence is not moot while some portion of that sentence remains in effect and where the appeal can shorten or otherwise ameliorate that remaining portion of the sentence.[4]

The Government, however, would have this Court carve out an exception to this line of precedent to hold that, as a consequence of Mr. Toledo-Flores's deportation, his appeal of his still-in-effect sentence is moot. It would be incongruous to determine that the district court still has jurisdiction over Mr. Toledo-Flores's supervised release term, *see supra* text, at 1-2, but that the appellate courts lack jurisdiction to review the sentence containing that same supervised release term. And it would be unfair to determine that deportation does ***not*** extinguish Mr. Toledo-Flores's supervised release term, *see supra* text, at 1 n.2, but ***does*** extinguish his right to appellate review of

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[4] *Compare, e.g., Mabry v. Johnson*, 467 U.S. 504, 507 n.3 (1984) (where defendant claimed that he was entitled to enforcement of prosecutor's withdrawn plea offer to recommend that defendant's prison sentences run concurrently, case was not moot despite defendant's release on parole, because favorable decision would mean an earlier expiration of defendant's parole), *and Jago v. Van Curen*, 454 U.S. 14, 21 n.3 (1981) (*per curiam*) (defendant's claims of error respecting earlier denial of parole were not rendered moot by his later release on parole, where defendant remained on parole and where success on appeal could possibly result in release from, or termination of, parole), *with, e.g., Lane v. Williams*, 455 U.S. 624, 631 (1982) (defendants' attacks on their sentences were moot, where those sentences (including their parole terms) had completely expired), *and Weinstein v. Bradford*, 423 U.S. 147, 148 (1975) (*per curiam*) (defendant's attack on procedures used to determine his parole eligibility was moot where defendant had not only been subsequently paroled, but had also been completely released from supervision). *Cf. North Carolina v. Rice*, 404 U.S. 244, 248 (1971) (*per curiam*) (suggesting that defendant's attack on his completely-served sentence appeared to be moot, but remanding for determination of any collateral consequences attaching under state law to length of discharged sentence).

the sentence including that supervised release term. The Government offers no persuasive reason to justify such an incongruous and unfair result.

As an initial matter, Mr. Toledo-Flores could still benefit from a retrospective reduction of his prison term, even though he has completely served even the longer prison term imposed by the district court. As the Second Circuit has explained, the length of a prior prison sentence is an important consideration in the Attorney General's discretionary decision whether to grant a waiver of inadmissibility, under 8 U.S.C. § 1182(d)(3), to a person otherwise ineligible for a nonimmigrant visa. *See United States v. Hamdi*, 432 F.3d 115, 119-21 (2d Cir. 2005). Prevailing in this appeal would give Mr. Toledo-Flores the opportunity for a lower prison sentence, which, in turn, could improve his chances of securing a § 1182(d)(3) waiver and a nonimmigrant visa to enter the United States. *See id.*

But even if only Mr. Toledo-Flores's supervised release term is considered,[5] the Government is wrong when it suggests that the Guideline error in this case "had [no] effect on the length of his supervised release." Resp. Br. 11. "[T]he controlling statutes explicitly make the Guidelines computation relevant to [Mr. Toledo-Flores's] supervised release, which persists to this day[.]" *United States v. McCoy*, 313 F.3d 561, 564 (D.C. Cir. 2002) (*en banc*) (finding challenge to Guidelines computation not moot despite defendant's completion of her prison sentence). Particularly, 18 U.S.C. § 3583(c), entitled "Factors to be considered in including a term of supervised release," provides:

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[5] The Government is wrong when it asserts that Mr. Toledo-Flores "has never challenged the imposition of a term of supervised release * * * * *" Resp. Br. 11. As noted above, *see supra* text, at 2 n.3, Mr. Toledo-Flores argued below for the vacatur of his ***sentence*** – which, as discussed above, includes the term of supervised release – and not just his term of imprisonment.

> The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set out in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

18 U.S.C. § 3583(c). "The most obviously relevant cross-referenced section is § 3553(a)(4)(A), which refers to 'the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission * * * * *'" *McCoy*, 313 F.3d at 564 (citation omitted). Therefore, notwithstanding his completion of the imprisonment component of his sentence, "[r]esentencing under a revised Guidelines computation clearly could benefit [Mr. Toledo-Flores]." *Id.*

Although, as the Government points out (Resp. Br. 11), up to one year of supervised release was authorized for Mr. Toledo-Flores's offense, the district court was not statutorily obliged to impose any supervised release term at all. *See* 8 U.S.C. § 1325(a); 18 U.S.C. § 3559(a)(5); 18 U.S.C. § 3583(a) & (b)(3). The district court could thus, on remand, resentence Mr. Toledo-Flores to less than one year of supervised release or no supervised release at all.[6] *See, e.g., United States v. Allen*, 434 F.3d 1166, 1170 (9th Cir. 2006) (finding that because "the district court could resentence Allen to a shorter term of supervised release in light of a shorter appropriate term of imprisonment or to no term of supervised release * * * [t]he length of the

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[6] The Government errs when, citing 18 U.S.C. § 3583(e)(1), it argues (Resp. Br. 12) that the district court cannot shorten Mr. Toledo-Flores's term of supervised release. Section 3583(e)(1) speaks only to a district court's ability to terminate a valid supervised release term; it does not purport to apply to the imposition of a supervised release term either at the initial sentencing or on resentencing after remand.

imprisonment sentence [was] therefore not moot" notwithstanding defendant's completion of his prison sentence) (citations omitted). This is therefore not a case where "an event occur[ring] while a case is pending on appeal" has "ma[de] it impossible for the court to grant any effectual relief whatever" to Mr. Toledo-Flores. *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) (internal quotation marks and citation omitted).

Moreover, while it is true that "erroneously served prison time is not to be [automatically] credited against a term of supervised release," Resp. Br. 11 (citing *United States v. Johnson*, 529 U.S. 53, 57-60 (2000)), such wrongful or excessive imprisonment is a factor that district courts may, in their discretion, permissibly consider in setting the length or conditions of supervised release on a remand for resentencing. *Cf. Johnson*, 529 U.S. at 60 (noting that wrongful incarceration may be equitable consideration militating in favor of modification or early termination of supervised release term). For all these reasons, "[Mr. Toledo-Flores's] unexpired term of supervised release, which could be reduced by a favorable appellate decision, is sufficient to defeat [the Government's] claim of mootness." *United States v. Castro-Rocha*, 323 F.3d 846, 848 n.1 (10th Cir. 2003) (citation omitted) (collecting cases); *see also, e.g., United States v. Lares-Meraz*, 452 F.3d 352, 355 (5th Cir. 2006) (defendant's appeal of sentence not moot, notwithstanding expiration of prison sentence and defendant's deportation to Mexico, where defendant remained subject to a term of supervised release that could be altered).

The Government next argues, however, that reversal of Mr. Toledo-Flores's sentence "would not have any practical effect on * * * his supervised release." Resp. Br. 11. Particularly, the Government argues (Resp. Br. 11-12) that, because Mr. Toledo-Flores has been deported, "[t]he term of supervised release thus has no effect on Toledo-Flores's

liberty and implicates no legally cognizable interest." Resp. Br. 12. The Government also argues that Mr. Toledo-Flores's supervised release term will assume significance only if he illegally enters the United States before that term expires – an illegal act that he is able, and required by law, to prevent. *See* Resp. Br. 12-13.

These arguments, however, ignore the fact that it is not impossible that Mr. Toledo-Flores could, under some circumstances, ***legally*** return to the United States within the supervised release term,[7] in which case he would be required to comply with every single condition of that supervised release, on pain of revocation and reincarceration. But, even in Mexico, Mr. Toledo-Flores "is still under the sentence of the District Court and on [supervised release] subject to conditions imposed by the District Court," violation of which will "subject [him] to imprisonment under his continuing criminal sentence." *United States v. Campos-Serrano*, 404 U.S. 293, 294 n.2 (1971).

Particularly, Mr. Toledo-Flores remains subject to a number of restrictive conditions of supervised release (*see* Resp. Br. 4a-7a) that require much more of him than simply not breaking the law. For example, he is required to "work regularly at a lawful occupation," to "refrain from excessive use of alcohol," and to refrain from "associat[ing] with any person convicted of a felony" without Probation Office permission. And, a violation of any of those conditions could subject Mr. Toledo-Flores to extradition,[8]

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[7] He could, for example, be paroled into the United States for "urgent humanitarian reasons or significant public benefit," 8 U.S.C. § 1182(d)(5)(A), including, for example, testifying in American court proceedings, *see* 8 C.F.R. § 212.5(b)(5); or he could be admitted on a nonimmigrant visa for the purposes of cooperating with federal or state law enforcement. *See* 8 U.S.C. §§ 1101(a)(15)(S)(i) & 1184(k).

[8] *See, e.g., United States v. Burke*, 425 F.3d 400, 407 (7th Cir. 2005) (noting that defendant was extradited from Great Britain to the United

(Continued on following page)

revocation of his supervised release, and reincarceration for up to one year, *see* 18 U.S.C. § 3583(e)(3), all "on the lesser showing needed to establish a [supervised release] violation than to prove a criminal offense." *Lane v. Williams*, 455 U.S. at 631; *see also* 18 U.S.C. § 3583(e)(3) (finding of supervised release violation may be made by a preponderance of the evidence). Mr. Toledo-Flores's continued subjection to a supervised release term entailing a number of restrictions on his otherwise lawful conduct, violation of which could result in reimprisonment, prevents this case from being moot.

In sum, as Judge Easterbrook has observed, "[u]nless we are confident that [Mr. Toledo-Flores] ***cannot*** benefit from success on appeal, the case is not moot." *United States v. Trotter*, 270 F.3d 1150, 1152 (7th Cir. 2001) (emphasis in original), *cert. denied*, 534 U.S. 1166 (2002); *see also id.* at 1152-53 (holding that appeal of sentence was not moot, despite expiration of prison sentence, where defendant remained on supervised release and "on remand [the] district court would have discretion to shorten the term of supervised release"). So long as Mr. Toledo-Flores's supervised release term remains in effect, he could benefit from an appellate remand giving the district court an opportunity to shorten, or to eliminate altogether, that supervised release term. Moreover, he could also benefit even from a retrospective reduction in the imprisonment

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States for violating the terms of his federal supervised release), *cert. denied*, 126 S. Ct. 2889 (2006); *cf., e.g., United States v. Lazerman*, No. 98-50339, 1999 WL 542876, at *2 (9th Cir. July 26, 1999) (unpublished) (upholding defendant's extradition from Canada to the United States for hearing on revocation of his federal probation); *McGann v. United States Board of Parole*, 488 F.2d 39, 40-41 (3d Cir. 1973) (upholding defendant's extradition from Jamaica to the United States for charged violations of federal parole), *cert. denied*, 416 U.S. 958 (1974).

term imposed for his offense. Mr. Toledo-Flores's case is therefore not moot.

II. MR. TOLEDO-FLORES'S PRIOR CONVICTION FOR SIMPLE POSSESSION OF 0.16 GRAMS OF COCAINE IS NOT AN "AGGRAVATED FELONY."

The question before the Court is whether Mr. Toledo-Flores's conviction for simple possession of 0.16 grams of cocaine, a felony under the law of Texas, is a conviction for "illicit trafficking in a controlled substance * * * including a drug trafficking crime (as defined in section 924(c) of Title 18)," thus making it an "aggravated felony" conviction under 8 U.S.C. § 1101(a)(43)(B). The Government makes no claim that Mr. Toledo-Flores's prior simple possession offense falls within the ordinary or legal meaning of "illicit trafficking in a controlled substance."[9] The Government likewise does not dispute that Mr. Toledo-Flores's prior possession offense would have been a misdemeanor under federal law. The question before the Court, therefore, reduces to this: in order to qualify as "a drug trafficking crime (as defined in section 924(c) of Title 18)," must an offense be one that is punishable as a federal felony under the three sets of statutes listed in 18 U.S.C. § 924(c)(2)? The answer to that question is "Yes."

If one assumes *arguendo* that the phrase "including a drug trafficking crime (as defined in section 924(c) of Title 18)" is not limited by the antecedent phrase "illicit trafficking in a controlled substance,"[10] the question then is how

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[9] In fact, as Mr. Toledo-Flores explained in his opening brief, *q.v.* at 15-16, simple possession of a controlled substance does ***not*** fall within the ordinary or legal meaning of the phrase "illegal trafficking in a controlled substance."

[10] But *see, e.g.*, Toledo-Flores Opening Br. 16-17; NYSDA Immigrant Defense Project Br. 6-20.

the term "drug trafficking crime" is defined in 18 U.S.C. § 924(c). The Government focuses primarily on 18 U.S.C. § 924(c)(2), which states that "the term 'drug trafficking crime' means any felony punishable under" the federal Controlled Substances Act ["CSA"] or two other groups of federal statutes. But, in order to get to its desired interpretation of the statute – namely, that an offense need only be punishable under the CSA and be designated as a "felony" by the jurisdiction of prosecution to qualify as a "drug trafficking crime" – the Government must resort to construing segments of § 924(c)(2) in isolation, in contravention of established principles of statutory construction requiring courts to examine statutes as a whole. *See, e.g., United States v. Morton*, 467 U.S. 822, 828 (1984) ("We do not, however, construe statutory phrases in isolation; we read statutes as a whole.") (footnote omitted).

First, the Government isolates the term "any felony" in § 924(c)(2), and argues that, because "'[r]ead naturally, the word "any" has an expansive meaning,'" Resp. Br. 19 (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)), the term "any felony" cannot logically be limited only to federal felonies, but must include state felonies as well. *See* Resp. Br. 19. But, as pointed out in Mr. Toledo-Flores's opening brief, *q.v.* at 13-15, the phrase "any felony" must be read in light of the long-standing presumption under *Jerome v. United States*, 318 U.S. 101, 104 (1943), that, absent some clear indication to the contrary, Congress is presumed not to make application of federal law dependent on state law. Indeed, in *Jerome*, the Court applied this presumption to hold that the very phrase at issue here – "any felony" – did not encompass state felonies that were not also federal felonies. *See Jerome*, 318 U.S. at 104 & 108; *cf. Small v. United States*, 544 U.S. 385, 388-94 (2005) (interpreting 18 U.S.C. § 922(g)(1)'s phrase "convicted in any court" in light of presumption against extraterritorial

application of United States laws and holding that phrase did not include foreign convictions).

In any event, contrary to the Government's argument (Resp. Br. 19), the term "any felony" does not stand alone. Rather, the term "any felony" is modified by the phrase "punishable under the [CSA and other federal acts]." In other words, here Congress ***did*** add "language limiting the breadth" of the phrase "any felony," *Gonzales*, 520 U.S. at 5, and that language is best read as limiting the phrase "any felony" in precisely the way argued by Mr. Toledo-Flores – as a felony under the specified federal laws.

The Government, however, repeats the error of reading parts of the applicable statute in isolation by focusing narrowly on the phrase "punishable under the" CSA, and arguing that this phrase "[s]ubstantively [d]escribes the [q]ualifying [c]riminal [c]onduct." Resp. Br. 24. The Government then patches together its interpretations of the phrases "any felony" and "punishable under the" CSA to reason that a "drug trafficking crime" under § 924(c)(2) includes "any felony" – *i.e.*, any offense under federal or state law that carries a maximum prison sentence exceeding one year – "punishable under the" CSA – *i.e.*, describing conduct that is punished under the CSA (whether as a felony or as a misdemeanor). *See* Resp. Br. 23.

The problem for the Government is that the most natural interpretation of the phrase "any felony punishable under the" CSA, when taken as a whole, is radically different from the meaning arrived at through the Government's piecemeal approach to § 924(c)(2). It is not just "any felony" that qualifies as a "drug trafficking crime"; it is "any felony punishable under the" CSA. In turn, § 924(c)(2) does not say "any felony ***describing conduct*** punishable under the" CSA; rather, the phrase "punishable under the" CSA is directly attached to, and hence

"modifie[s] * * * and * * * restrict[s]," *Lewis v. United States*, 445 U.S. 55, 60 (1980), the term "any felony."

In fact, the most natural meaning of the phrase "any felony punishable under the" CSA, taken as a whole, is any offense that is punishable as a felony under the CSA. *See* Toledo-Flores Opening Br. 22-26. As Judge Posner has observed, the fact that the term "felony" in isolation may refer to either a federal felony or a state felony

> doesn't imply, however, that a state felony is ***punishable*** under the Controlled Substances Act. State crimes, as distinct from the acts constituting the crimes, are not usually punished by federal law. Federal law punishes bank robberies, as does state law; but the federal bank robbery statute does not say that anyone who is convicted of bank robbery in state court is guilty of a federal offense. 18 U.S.C. § 2113. The Controlled Substances Act does not purport to punish state drug felonies * * * *

Gonzales-Gomez v. Achim, 441 F.3d 532, 534 (7th Cir. 2006) (emphasis in original).

In addition to misreading § 924(c)(2), the Government focuses too narrowly on that subsection alone, glossing over the fact that 8 U.S.C. § 1101(a)(43)(B) does not refer to "drug trafficking crime[s] (as defined in section 924(c)***(2)***)," but rather refers more globally to "drug trafficking crime[s] (as defined in section 924(c))." As pointed out in Mr. Toledo-Flores's opening brief, *q.v.* at 19-22, § 1101(a)(43)(B)'s global reference to § 924(c) as a whole leaves no doubt that the term "drug trafficking crime" in § 1101(a)(43)(B) is meant to refer only to drug felonies "for which the person may be prosecuted in a court of the

United States," 18 U.S.C. § 924(c)(1)(A) – *i.e.*, federal drug felonies.[11]

The Government attempts to minimize the significance of the reference to § 924(c) as a whole by asserting conclusorily that "only Section 924(c)(2) ***defines*** 'drug trafficking crime'" (Resp. Br. 21) (emphasis in original) and that "Subsection (c)(1) * * * is not a definitional section." Resp. Br. 21-22. The Government claims that "if Section 924(c)(2) had the federal-felony limitation that petitioners posit, there would have been no reason for Congress separately to require that the drug trafficking crime be subject to federal prosecution in federal court before it will support a [§] 924(c)(1) federal prosecution." Resp. Br. 22 (footnote omitted). But the Government refutes its own argument when it points out (Resp. Br. 22 n.15) (1) that this language was necessary to make sure that only federal "crimes of violence" could serve as predicate offenses under § 924(c)(1)(A); and (2) that the "prosecut[able] in a court of the United States" limitation preceded the addition of "drug trafficking crimes" to § 924(c).

Finally, the Government argues (Resp. Br. 13, 15-16, 22, 31, 42, 45) that even if 18 U.S.C. § 924(c), standing alone, requires an offense that is a federal felony, the penultimate sentence of 8 U.S.C. § 1101(a)(43)[12] also sweeps in state felony offenses. That interpretation flounders under a plain reading of the statute. Section 1101(a)(43)(B) describes the type of offenses that are

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[11] Of course, for purposes of § 924(c), these drug felonies need not actually be prosecuted in federal court (or prosecuted anywhere, for that matter); they need only be federally ***prosecutable*** as felonies.

[12] That sentence reads, in relevant part: "The term ['aggravated felony'] applies to an offense described in [§ 1101(a)(43)] whether in violation of Federal or State law * * * * *".

aggravated felonies – for purposes of the instant case, offenses that are punished as felonies under the federal Controlled Substances Act. The penultimate sentence of § 1101(a)(43) does not alter the ***description*** of these offenses; rather, it simply assures that offenses fitting this description will be included "whether in violation of Federal or State law." In other words, the function of the penultimate sentence of § 1101(a)(43) is merely to assure that offenses of the type described in § 1101(a)(43)(B) will count as "aggravated felonies" regardless of the jurisdiction – federal, state, or (sometimes) foreign – in which they are prosecuted. Indeed, the legislative history behind the addition of that sentence reflects that this was its purpose. *See United States v. Ibarra-Galindo*, 206 F.3d 1337, 1343-44 (9th Cir. 2000) (Canby, J., dissenting) (discussing that legislative history and making this same point), *cert. denied*, 531 U.S. 1102 (2001).

The Government also disputes (Resp. Br. 40-42) the relevance of the legislative history discussed by Mr. Toledo-Flores in his opening brief, *q.v.* at 30-37. Having thoroughly discussed that legislative history there, Mr. Toledo-Flores will not repeat that discussion here. One point does, however, require some response.

The Government concedes (Resp. Br. 40) that the 1988 legislation changing the definition of "drug trafficking crime" from "any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substance" to its present text was, according to the legislative history, meant to be a "clarification." The Government then argues, however, without citation to any legislative history, that it was not just a "clarification" of the prior law, but rather a radical expansion of the offenses that could qualify as a "drug trafficking crime" under § 924(c). (Resp. Br. 40-41).

Had Congress intended to make such a radical change in the law, one would expect at least some indication in the legislative history to that effect;[13] but the Government points to none. Indeed, the Government points (Resp. Br. 42-43 & n.33) to no legislative history supporting its view, save for some very general remarks by single legislators – the very least persuasive of all types of legislative history[14] – and the testimony of witnesses at congressional hearings, which of course sheds no light on the thinking of Congress at all. For all these reasons, the phrase "drug trafficking crime (as defined in section 924(c) of Title 18)" is best read to mean an offense that ***could be*** prosecuted as a federal felony under the three acts listed in § 924(c)(2).[15]

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[13] *See, e.g., Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 176 (1993) ("It would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect. Not a scintilla of evidence of such an intent can be found in the legislative history.").

[14] "The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979); *accord Consumer Prod. Safety Comm. v. GTE Sylvania*, 447 U.S. 102, 118 (1980); *see also Garcia v. United States*, 469 U.S. 70, 76 (1984) ("We have eschewed reliance on the passing comments of one Member, and casual statements from the floor debates.") (citations omitted).

[15] The Government suggests that this approach "would harm other aliens who, for example, were convicted of an offense that is a misdemeanor under state law, but a felony under federal law, either in its own right or due to a recidivist provision." Resp. Br. 48. But, if the jurisprudence is any indication, there are probably relatively few crimes that are state-law misdemeanors but federal felonies. Moreover, even if "drug trafficking crime[s] (as defined in [18 U.S.C. § 924(c)(1)])" may, standing alone, be state-law misdemeanors that correspond to federal felonies, the language of 8 U.S.C. § 1101(a)(43) – namely, the fact that it refers to aggravated ***felonies*** – in conjunction with the requirement under both immigration and criminal law that a person have been ***convicted*** of the aggravated felony, *see* 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1326(b)(2); U.S. SENTENCING GUIDELINES MANUAL ("USSG") § 2L1.2(b)(1)(C), may prohibit

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The Government's policy-based arguments fare no better than its textual or legislative history arguments. The Government argues (Resp. Br. 38-39) that its reading of the statute (the State Felony Approach) is bolstered by the fact that, unlike the federal system, "[a] number of States * * * establish a graduated system of penalties for possession, under which possession of trafficking-level amounts of a controlled substance are subject to the same type of severe penalties as federal trafficking offenses, even though the offense of conviction remains denominated 'possession.'" Resp. Br. 39. The Government fails to note, however, that these sorts of possession statutes may sit side-by-side with more traditional trafficking-type statutes, which would indubitably qualify as "drug trafficking crimes" under § 924(c). *Compare, e.g.*, TEX. HEALTH & SAFETY CODE § 481.121(b)(5) (possession of more than 50, up to 2000, pounds of marijuana is a second-degree felony), *with* TEX. HEALTH & SAFETY CODE § 481.120(b)(5) (delivery of same quantity of marijuana a first-degree felony). But, regardless of whether the decision to prosecute an individual under one of these sorts of possession statutes is an individual prosecutorial decision, or an across-the-board state legislative decision, those decisions by state actors are no excuse for distorting the plain words of the statutory scheme at issue here.

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the attachment of the "aggravated felony" label to an offense that was only a misdemeanor (*i.e.*, punishable by no more than one year's imprisonment) under the law of the jurisdiction that prosecuted it. *See* American Bar Association Br. 10-13.

In any event, this case does not require this Court to decide that question. It is enough for this Court to hold that application of 8 U.S.C. § 1101(a)(43)(B)'s "drug trafficking crime" prong requires conduct that is proscribed as a felony by federal law. Whether aggravated felony status may attach based on a misdemeanor conviction for conduct that is a felony under federal law is a question that should be left for another day.

Moreover, to deny "aggravated felony" status even to these sorts of possession offenses does not leave the Government without effective tools in either the immigration context or the criminal law context. Possession of any controlled substance other than less than thirty grams of marijuana, even if not an "aggravated felony," is an offense "relating to a controlled substance" that is a separate basis for removal from the United States. *See* 8 U.S.C. § 1227(a)(2)(B)(i). And, the underlying facts of the offense may be considered in the decision whether the immigrant is entitled to discretionary relief from removal. *See, e.g., Gouveia v. INS*, 980 F.2d 814, 817 (1st Cir. 1992) (noting that, in order to assess whether it is appropriate to grant discretionary relief from deportation, "the nature and the gravity of the conviction(s) undergirding the deportation proceedings must be scrutinized * * * [and] a judge must necessarily be free to inquire into the circumstances surrounding the commission of the crime(s)"). Likewise, in the criminal law context, even if an alien is not subject to an eight-level "aggravated felony" enhancement under USSG § 2L1.2(b)(1)(C) for his simple possession conviction, a federal sentencing court can, under *United States v. Booker*, 543 U.S. 220 (2005), take the underlying facts of the offense into account insofar as those facts are relevant to the various sentencing factors of 18 U.S.C. § 3553(a).

The Government also asserts (Resp. Br. 31-33) that the Federal Felony Approach would be too difficult to administer in practice. Of course, in Mr. Toledo-Flores's case, it is perfectly clear that his prior offense (simple possession of 0.16 grams of cocaine) is ***not*** a federal felony. In any event, the Government's concerns are exaggerated. The process of comparing a state offense to those offenses proscribed as felonies under the federal acts listed in § 924(c)(2) is no more difficult than the very similar comparative process mandated by this Court in *Taylor v. United States*, 495 U.S. 575 (1990), for determining

whether a state offense qualifies as burglary for purposes of sentence enhancement under 18 U.S.C. § 924(e). *See Taylor*, 495 U.S. at 599-602; *see also Shepard v. United States*, 544 U.S. 13, 16, 19-23, 26 (2005) (applying *Taylor* in scenario where prior conviction resulted from guilty plea rather than from jury trial). Federal courts are perfectly capable of resolving any questions arising at the margins from application of the Federal Felony Approach (*e.g.*, with respect to second or subsequent state possession convictions). *See, e.g., Gerbier v. Holmes*, 280 F.3d 297, 316-18 (3d Cir. 2002) (addressing such a question). Moreover, in criminal cases, the Federal Felony Approach has the virtue of assuring that an "aggravated felony" sentencing enhancement will be applied uniformly on the basis of the same conduct regardless of the label or the punishment that a particular State attaches to that conduct – precisely the same consideration that led this Court to adopt a uniform federal definition of "burglary" in *Taylor*. *See Taylor*, 495 U.S. at 590-92.

Finally, the Government asserts (Resp. Br. 48-49) that there is no "grievous ambiguity" triggering the rule of lenity in this case. Although a division of authority among lower courts on the interpretation of a statute is not "***automatically*** sufficient to trigger [application of the rule of] lenity," *Moskal v. United States*, 498 U.S. 103, 108 (1990) (emphasis added; footnote omitted),[16] here the number of thoughtful, well-reasoned opinions supporting application of the Federal Felony Approach show, at a minimum, that the Government's position is not "unambiguously correct," thus requiring the Court to "apply the rule of lenity and resolve the ambiguity in [petitioners']

[16] The Court explained that "[i]f that were sufficient, one court's unduly narrow reading of a criminal statute would become binding upon all other courts, including this one." *Id.*

favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994).[17]

In sum, the plain text of the statutes at issue indicates that Congress intended to adopt the Federal Felony Approach. This interpretation is supported by the legislative history, and furthers the important interest of uniformity of application of both immigration and federal criminal law. And, even if a contrary reading of the statutes were possible, that contrary reading is, at a minimum, not unambiguously correct, thus requiring application of the Federal Felony Approach in Mr. Toledo-Flores's case under the rule of lenity.[18] Because the Fifth

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[17] The Government argues (Resp. Br. 48) that "even if applicable, the rule of lenity would not point in any particular direction in this case," because the Federal Felony Approach advocated by petitioners would not be the most lenient approach for certain other persons to whom these statutes might apply. This argument is, however, firmly rebutted by *Granderson* itself, in which the Government argued, and this Court agreed, that, for the particular ambiguous statute at issue in that case, the rule of lenity would compel a different interpretation of the statute for certain defendants than the interpretation given to the statute by the Court for the particular petitioner in that case. *See Granderson*, 511 U.S. at 57 n.15. *Granderson* thus stands for the proposition that the rule of lenity is defendant-specific; and that where a statute is ambiguous, it must be given the interpretation most beneficial to the particular defendant under consideration.

[18] That the Government's interpretation is, at a minimum, not unambiguously correct is also demonstrated by a contrary interpretation of 18 U.S.C. § 924(c)(2) by another agency within the United States Department of Justice itself. The Federal Bureau of Prisons ("BOP") is required, under 18 U.S.C. § 4042(b)(1), to alert state and local law enforcement officials of the imminent release from federal custody of a prisoner convicted of "a drug trafficking crime, as that term is defined in section 924(c)(2)[.]" 18 U.S.C. § 4042(b)(3)(A). And, for purposes of this directive, the BOP defines the term "drug trafficking crime" as follows: "Any current or prior felony offense under 21 U.S.C. § 801 through § 863 (inclusive), 21 U.S.C. § 951 through § 971 (inclusive), or 46 U.S.C. App. § 1903 (see 18 U.S.C. § 924(c)(2))." Federal Bureau of Prisons Program Statement 5110.15 (Aug. 30, 2000), § 8(a), available at http://www.bop.gov/policy/progstat/5110_015.pdf (last visited Sept. 17,

(Continued on following page)

Circuit thus erred in applying the State Felony Approach in deciding Mr. Toledo-Flores's case, this Court should reverse the judgment of the Fifth Circuit.

CONCLUSION

The judgment of the United States Court of Appeals should be reversed.

Respectfully submitted,

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2006). The BOP's definition of "drug trafficking crime" is consistent with the Federal Felony Approach, not the State Felony Approach.

RESPONSE REQUESTED

ORIGINAL

Nos. 05-7496, 05-7664

Supreme Court, U.S.
FILED
FEB 28 2006
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IN THE SUPREME COURT OF THE UNITED STATES

CECILIO MENDOZA-TORRES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

REYMUNDO TOLEDO-FLORES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

The following question presented is common to all petitioners in Nos. 05-7496 and 05-7664:

Whether petitioners' prior state convictions for possession of a controlled substance constitute "aggravated felon[ies]" triggering a recommended sentence enhancement under Section 2L1.2(b)(1)(C) of the Sentencing Guidelines.

The following questions presented apply only to petitioners in No. 05-7496:

1. Whether error in applying the federal system of Sentencing Guidelines as mandatory warrants automatic reversal under plain-error review.

2. Whether, to demonstrate plain error based on this Court's decision in United States v. Booker, 543 U.S. 220 (2005), petitioners were required to show a reasonable probability that they would have received more lenient sentences under an advisory system of Sentencing Guidelines.

3. Whether this Court's decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), should be overruled.

The following question presented applies only to petitioner Guardado-Ortega in No. 05-7496:

Whether the court of appeals erred in refusing to consider on the merits petitioner's claim that his sentence violated his Sixth Amendment rights, under United States v. Booker, 543 U.S. 220 (2005), where petitioner raised that claim for the first time in a petition for a writ of certiorari.

IN THE SUPREME COURT OF THE UNITED STATES

No. 05-7496

CECILIO MENDOZA-TORRES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 05-7664

REYMUNDO TOLEDO-FLORES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals (05-7496 Pet. App. 41-77; 05-7664 Pét. App. A19-A20) are not reported.

JURISDICTION

The court of appeals entered its judgments in the cases of petitioners Mendoza-Torres and Sauzo-Izaguirre in No. 05-7496 on

August 15, 2005. The court of appeals entered its judgments in the cases of petitioner Toledo-Flores in No. 05-7664 and of petitioners Ramirez-Maldonado, Alejo-Agramon, Eguia-Hernandez, Armendariz-Chavez, Palencia-Contreras, and Colatos-Rivas in No. 05-7496 on August 17, 2005. The court of appeals entered its judgments in the cases of petitioners Vences, Guardado-Ortega, and Loredo-Pecina in No. 05-7496 on August 24, 2005, September 30, 2005, and October 4, 2005, respectively. The petition for writs of certiorari in No. 05-7496 was filed on November 9, 2005. The petition for a writ of certiorari in No. 05-7664 was filed on November 15, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In separate proceedings in the United States District Court for the Southern District of Texas, each petitioner pleaded guilty to illegally reentering the United States after having been deported following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326. In each case, the court of appeals affirmed. See 05-7496 Pet. App. 41-77; 05-7664 Pet. App. A19-A20.

1. Under 8 U.S.C. 1326, Congress set the baseline maximum sentence for illegal reentry at two years of imprisonment. 8 U.S.C. 1326(a). The Sentencing Guidelines provide a base offense level of eight for illegal reentry and authorize an eight-level upward adjustment if the defendant committed an "aggravated felony" before removal. Sentencing Guidelines § 2L1.2(b)(1)(C). The

Sentencing Guidelines adopt the definition of "aggravated felony" in the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43). See Sentencing Guidelines § 2L1.2, comment. (n. 3(A)). Section 1101(a)(43)(B), in turn, defines "aggravated felony" to include a "drug trafficking crime," as defined in 18 U.S.C. 924(c). Finally, 18 U.S.C. 924(c)(2) defines a "drug trafficking crime" to include "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.)."

2. Petitioners were charged with illegal reentry in violation of 8 U.S.C. 1326. They pleaded guilty and were sentenced under the eight-level aggravated-felony enhancement of Guidelines § 2L1.2(b)(1)(C) because each of them had a state-law felony conviction for possession of a controlled substance before his removal. Petitioner Loredo-Pecina in No. 05-7496 was sentenced to 15 months of imprisonment (see 04-40440 Gov't C.A. Br. 3); petitioner Ramirez-Maldonado in No. 05-7496 was sentenced to 21 months of imprisonment (see 04-40749 Gov't C.A. Br. 3); petitioner Guardado-Ortega in No. 05-7496 was sentenced to 22 months of imprisonment (see 04-20299 Gov't C.A. Br. 4); petitioner Armendariz-Chavez in No. 05-7496 and petitioner Toledo-Flores in No. 05-7664 were each sentenced to 24 months of imprisonment (see 04-40674 Gov't C.A. Br. 3; 05-7664 Pet. App. B22); petitioner Colatos-Rivas in No. 05-7496 was sentenced to 30 months of imprisonment (see 04-20366 Gov't C.A. Br. 3); petitioners Sauzo-

Izaguirre and Alejo-Agremon in No. 05-7496 were sentenced to 33 months of imprisonment (see 04-40434 Gov't C.A. Br. 3; 04-40919 Gov't C.A. Br. 3); petitioner Vences in No. 05-7496 was sentenced to 34 months of imprisonment (see 04-40504 Gov't C.A. Br. 3); petitioners Mendoza-Torres and Eguia-Hernandez in No. 05-7496 were sentenced to 36 months of imprisonment (see 04-40672 Gov't C.A. Br. 3; 04-41118 Gov't C.A. Br. 3); and petitioner Palencia-Contreras in No. 05-7496 was sentenced to 37 months of imprisonment (see 04-41366 Gov't C.A. Br. 4).

3. The court of appeals affirmed in 12 separate unpublished decisions. See 05-7498 Pet. App. 41-77; 05-7664 Pet. App. A19-A20. In each case, the court applied controlling circuit precedent to hold that the individual petitioner's prior drug-possession conviction constituted an aggravated felony for purposes of the Sentencing Guidelines' illegal-reentry provision, Section 2L1.2(b)(1)(C). See 05-7496 Pet. App. 41-42, 47-48, 49-50, 52-53, 56, 59, 61, 64, 68-69, 73, 76-77; 05-7664 Pet. App. A20.

Petitioners Mendoza-Torres, Sauzo-Izaguirre, Ramirez-Maldonado, Alejo-Agramon, Eguia-Hernandez, Palencia-Contreras, Colatos-Rivas, Vences, and Loredo-Pecina in No. 05-7496 also argued that their prior felony convictions constituted an element of the offense that should have been charged in the indictment and established through a guilty plea or found at trial beyond a reasonable doubt. The court of appeals rejected that argument

based on Almendarez-Torres v. United States, 523 U.S. 224 (1998). See 05-7496 Pet. App. 42, 48, 50-51, 53, 56, 61, 64, 69, 77.

In addition, each petitioner in No. 05-7496 argued for the first time on appeal that the district court had committed reversible error by sentencing him under the mandatory Sentencing Guidelines regime that this Court ruled unconstitutional in United States v. Booker, 543 U.S. 220 (2005). See 05-7496 Pet. App. 42-43, 45, 51, 53-54, 56-57, 59, 61-62, 64-65, 67, 71, 75. Reviewing those claims for plain error, the court of appeals held that the district court committed an error that was plain by sentencing the petitioners under a mandatory Guidelines system, but that the petitioners had not shown that the error affected their substantial rights. See ibid.

DISCUSSION

1. The petition in No. 05-7496 should be denied with respect to four of the petitioners, Colatos-Rivas, Guardado-Ortega, Loredo-Pecina, and Ramirez-Maldonado. The petition exclusively raises questions that challenge those petitioners' criminal sentences. 05-7496 Pet. i. But, according to the Department of Homeland Security, each of those petitioners has completed his sentence and has been removed from the jurisdiction of the United States.[1] "The

[1] According to the Department of Homeland Security, Colatos-Rivas was removed to El Salvador on February 10, 2006; Guardado-Ortega was removed to Mexico on July 1, 2005; Loredo-Pecina was removed to Mexico on January 14, 2005; and Ramirez-Maldonado as removed to Mexico on August 5, 2005.

[]incarceration that [each] incurred * * * is now over, and cannot be undone." Spencer v. Kemna, 523 U.S. 1, 8 (1998). Resolution of this case thus could not have the type of practical effect on those petitioners that would warrant an exercise of this Court's certiorari jurisdiction and, indeed, the case may be moot with respect to those petitioners.

First, because petitioners now reside in either Mexico or El Salvador, they are not presently under the jurisdiction, custody, or control of the United States government. Were the Court both to grant review and to reverse the convictions, the decision would have no practical or legal impact on petitioners' liberty.

Second, the determination at sentencing that petitioners' prior state-law convictions were for aggravated felonies would have prospective effect only if petitioners again violate United States law by again reentering the United States illegally. But a defendant cannot evade mootness principles with respect to a completed sentence by pointing to the possible consequences of the sentence if he were to commit future crimes. Petitioners themselves are "able -- and indeed required by law -- to prevent" any adverse prospective consequences "from occurring" by not reentering the United States illegally. Spencer, 523 U.S. at 15 (quoting Lane v. Williams, 455 U.S. 624, 633 n.13 (1982)).

Third, the potential collateral immigration consequences of the determination at sentencing that petitioners had committed an

aggravated felony are insufficient to perpetuate the controversy and to merit this Court's review. Because each petitioner unquestionably has committed both a controlled substance offense and the federal felony of illegal reentry, the prospects of obtaining prospective immigration relief -- relief petitioners make no claim to be seeking or intending to seek -- are too speculative to justify an exercise of this Court's certiorari jurisdiction and may be too speculative to avoid mootness. See 8 U.S.C. 1101(a)(43)(B) and (O).[2]

2. Petitioners contend (05-7496 Pet. 7-14; 05-7664 Pet. 9-17) that the court of appeals erred in determining that their pre-deportation convictions for drug possession constitute aggravated felonies that support application of an eight-level enhancement under Sentencing Guidelines § 2L1.2(b)(1)(C).

On January 24, 2006, the United States filed a brief at the certiorari stage in Lopez v. Gonzales, No. 05-547, which agreed with the petitioner in that case that the Court should grant certiorari to decide whether the commission of a controlled

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[2] United States v. Campos-Serrano, 404 U.S. 293 (1971), and United States v. Villamonte-Marquez, 462 U.S. 579 (1983), are not to the contrary. Those cases were not mooted by a defendant's removal because it was the *government* that sought this Court's review to reinstate an overturned criminal *conviction*, not to challenge a criminal sentence. Reinstatement of that conviction could have led to extradition of the defendants and the existence of the convictions could have had distinct immigration consequences. See Villamonte-Marquez, 462 U.S. at 581 n.2; Campos-Serrano, 404 U.S. at 295.

substance offense that is a felony under state law, but that is generally punishable under the Controlled Substances Act only as a misdemeanor, constitutes an "aggravated felony," within the meaning of 8 U.S.C. 1101(a)(43). The issue in Lopez arises in the context of a removal proceeding under federal immigration law, rather than in the criminal sentencing context. Nevertheless, should this Court grant the petition for a writ of certiorari in Lopez, the Court's decision in that case will shed light on the proper interpretation of the same statutory provision, 8 U.S.C. 1101(a)(43), that Sentencing Guidelines § 2L1.2(b)(1)(C) incorporates. The Court's decision thus may influence the lower courts' voluntary application of the Sentencing Guidelines' aggravated-felony enhancement in illegal reentry cases like petitioners'. Therefore, the Court may wish to hold the petition in No. 05-7664 and the petition in No. 05-7496, with respect to the first question presented only and with respect to petitioners Mendoza-Torres, Suazo-Izaguirre, Alejo-Agramon, Eguia-Hernandez, Armendariz-Chavez, Palencia-Contreras, and Vences only, pending the Court's disposition of the petition for a writ of certiorari in Lopez v. Gonzales, No. 05-547.

3. With respect to each petitioner in No. 05-7496, the district court at sentencing treated the Sentencing Guidelines as mandatory. That was error, in light of this Court's decision in United States v. Booker, 543 U.S. 220 (2005). Petitioners contend

(Pet. 18-21) that every misapplication of the Sentencing Guidelines as mandatory necessarily constitutes "structural" error affecting a defendant's substantial rights, and thus automatically survives plain-error review under Federal Rule of Criminal Procedure 52(b) and requires reversal for a new sentencing. That claim does not merit further review and, in fact, is foreclosed by Booker itself:

> Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain error' test.

543 U.S. at 268. If, as petitioners' contend, each erroneous application of the Sentencing Guidelines necessarily established structural error that required reversal, the Court would not have invited application of the plain-error doctrine to Booker claims, nor would it have envisioned appeals that do not lead to a new sentencing hearing.

Contrary to petitioners' argument (Pet. 21), the case need not be held pending this Court's decision in Washington v. Recuenco, No. 05-83, cert. granted, 126 S. Ct. 478 (2005). That case presents the question whether a preserved sentencing error under this Court's decision in Blakely v. Washington, 542 U.S. 296 (2004), that implicates the defendant's Sixth Amendment rights is subject to harmless error analysis under Neder v. United States, 527 U.S. 1 (1999). The Recuenco case thus presents no occasion for the Court to address the application of plain-error review to

Booker claims, and it is unlikely to shed any significant light on petitioners' claims for automatic reversal based on unpreserved errors that do not implicate a defendant's Sixth Amendment rights (see Pet. 21). That is a matter the Court already addressed in Booker, 543 U.S. at 268.

4. Petitioners in No. 05-7496 also argue (Pet. 21-27) that this Court's review is warranted because, in petitioners' view, the court of appeals has misapplied this Court's decision in United States v. Dominguez Benitez, 542 U.S. 74 (2004). Further review of that question is not warranted. In Dominguez Benitez, this Court held that a defendant must demonstrate a "reasonable probability" that a Rule 11 error affected his decision to plead guilty in order to establish plain error. Id. at 83. The Fifth Circuit has followed the Eleventh Circuit in applying the "reasonable probability" standard to hold that the "burden truly is on the defendant to show that the error actually did make a difference," such that "if it is equally plausible that the error worked in favor of the defense, the defendant loses," and if "the effect of the error is uncertain * * * the defendant loses." United States v. Mares, 402 F.3d 511, 521 (5th Cir.) (quoting and adopting the standard set forth in United States v. Rodriguez, 398 F.3d 1291 (11th Cir.), cert. denied, 125 S. Ct. 2935 (2005)), cert. denied, 126 S. Ct. 43 (2005).

This Court has already denied review within the last nine months in both Rodriguez and Mares. See Mares v. United States, 126 S. Ct. 43 (2005); Rodriguez v. United States, 125 S. Ct. 2935 (2005). There is no reason for a different result here. Quite the contrary, while petitioners express concern about the outcome of cases where the evidence is close or evenly balanced (Pet. 22-23), no petitioner below presented such a difficult case; most of them presented no evidence at all.[3] Petitioners thus have made no showing that any of them would be entitled to relief under the verbal formulation of the plain-error test that they advocate.

In any event, even if petitioners could have shown that the sentencing error affected their substantial rights, relief on

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[3] See 05-7496 Pet. App. 43; id. at 45 ("Absent any indication in the record" that petitioner would have received a lesser sentence, court could not conclude "with a probability sufficient to undermine confidence in the outcome" that the error affected petitioner's rights) (emphasis added); id. at 51; id. at 53-54 ("Alejo-Agramon has failed to point to anything in the record indicating that the district court would have reached a different conclusion had it known that the Sentencing Guidelines were advisory.") (emphasis added); id. at 57 ("Eguia concedes that the district court did not indicate that it would have imposed a lesser sentence in the absence of mandatory guidelines."); id. at 62 (petitioner "points to nothing in the record indicating that the district court would have imposed a lesser sentence under an advisory scheme") (emphasis added); id. at 65 (district court had already rejected mitigating evidence); id. at 67 ("Nothing in the record indicates that the sentencing judge would have given a lower sentence.") (emphasis added); id. at 71 (petitioner "concedes, however, that he cannot make the necessary showing of plain error that is required by [Mares]"); id. at 75 (petitioner "concedes that he cannot establish plain error because the record does not indicate that the district court would have reached a significantly different result under an advisory guidelines scheme").

plain-error review would not have been warranted in their cases. Petitioners make no claim that their sentences exceeded their respective advisory Guidelines ranges. As a result, their sentences did not call into question the fairness, integrity, or public reputation of sentencing proceedings, which is an additional requirement for relief under the plain-error test. See 04-1148 U.S. Br. 10-11, Rodriguez, supra. Because resolution of the question presented would have no practical effect on the outcome of any of petitioners' cases, this Court's review is not warranted.[4]

5. Petitioners contend (05-7496 Pet. 35-39) that this Court should grant review in order to overrule Almendarez-Torres v. United States, 523 U.S. 224 (1998). That argument lacks merit. In Apprendi v. New Jersey, 530 U.S. 466 (2000), this Court held, as a matter of federal constitutional law, that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. Since that time, the Court has repeatedly reaffirmed that the rule announced in Apprendi applies to any penalty-enhancing fact "other than a prior conviction." Booker, 543 U.S. at 244; see Blakely, 542 U.S. at 301; Dretke v. Haley, 541 U.S. 386, 395 (2004); see also Shepard v. United States, 125 S. Ct. 1254, 1262 (2005)

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[4] We have provided a copy of the government's brief in opposition in Rodriguez v. United States, No. 04-1148, to counsel for petitioners in No. 05-7496.

(plurality opinion). In addition, this Court has repeatedly denied petitions for writs of certiorari that have urged the overruling of Almendarez-Torres. See, e.g., Cerna-Salguero v. United States, 125 S. Ct. 2936 (2005) (No. 04-9248); Ortiz-Rosas v. United States, 543 U.S. 1124 (2005) (No. 04-6950); Aguilera-De Flores v. United States, 542 U.S. 906 (2004) (No. 03-9351); Garza-Garza v. United States, 541 U.S. 1031 (2004) (No. 03-8730); Garcia-Saldivar v. United States, 541 U.S. 1011 (2004) (No. 03-8536). There is no reason for a different outcome in this case.

6. Petitioners are correct (05-7496 Pet. 27-31) that there is a conflict in the circuits on the proper application of the plain-error test to claims of Booker error. See also 04-1148 U.S. Br. 11-18 (Rodriguez, supra). The petition for a writ of certiorari in Rodriguez presented the same plain-error issue petitioners raise and alleged the same circuit conflict. The government suggested that this Court grant certiorari in order to resolve the conflict in the circuits, but the Court denied review. 125 S. Ct. 2935. There is no basis for a different outcome here. Indeed, if anything, the transitional plain-error issue presented here is of increasingly diminishing importance as the finite set of cases that might be affected by this Court's decision dwindles in number.

7. Petitioner Guardado-Ortega contends (05-7496 Pet. 33-35) that this Court should grant review to consider whether the Court's

decision in Booker constitutes an "extraordinary circumstance" that would permit a defendant to raise a Booker claim for the first time in a petition for a writ of certiorari. In United States v. Taylor, 409 F.3d 675 (5th Cir. 2005), the Fifth Circuit held that, "absent exceptional circumstances," the court would not consider a Booker argument "raised for the first time in a petition for certiorari," id. at 676.

Petitioner does not challenge the court of appeals' legal standard requiring "extraordinary circumstances" before entertaining new claims that were never raised in the party's court of appeals' briefs or arguments. He argues (Pet. 33), instead, that "the Booker decision itself, which was not issued until ***after*** the Fifth Circuit's original decision in his case," constitutes an "extraordinary circumstance" justifying raising the issue for the first time in a petition for a writ of certiorari.

That challenge to the court of appeals' particularized application of its procedural-bar rule does not warrant this Court's review. First, the passage of time is quickly diminishing and will soon eliminate recurrence of the issue, as district courts now routinely apply Booker to sentencing proceedings in the first instance.

Second, this Court has long recognized that courts of appeals may adopt reasonable rules restricting the consideration of issues not raised in a timely manner, Thomas v. Arn, 474 U.S. 140, 146-148

(1985), and there is no mandate or necessity for uniformity among the circuits in their development or application of such rules, see Ortega-Rodriguez v. United States, 507 U.S. 234, 251 n.24 (1993). Indeed, this Court already has denied review in a number of cases, including as recently as last month, in which courts of appeals declined to entertain new and untimely constitutional challenges to sentences under this Court's intervening decisions in Booker, Blakely, or Apprendi. See, e.g., Gutierrez v. United States, 126 S. Ct. 1141 (Jan. 17, 2006); Claritt v. United States, 126 S. Ct. 417 (2005); Phillips v. United States, 536 U.S. 961 (2002); Garcia v. United States, 534 U.S. 823 (2001). There is no reason for a different result here.[5]

CONCLUSION

The petitions for writs of certiorari in No. 05-7664 and, with respect to the first question presented by petitioners Mendoza-

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[5] Guardado-Ortega also suggests (05-7496 Pet. 33) that the Court should grant review to consider whether a court of appeals may treat a Booker-related claim as abandoned if not raised until after the initial briefing of a case on appeal. Cf. United States v. Levy, 416 F.3d 1273, 1275-1279 (11th Cir.) (applying procedural default rule), cert. denied, 126 S. Ct. 643 (2005). This claim is not fairly included within Guardado-Ortega's question presented, Pet. iv; see 05-7496 Pet. 33-35, and even if it were, this Court has repeatedly rejected similar claims that were based on Booker and its predecessor Blakely. See, e.g., Baxter v. United States, No. 05-8515, cert. denied, 2006 WL 386875 (Feb. 21, 2006); Giglio v. United States, No. 05-8586, cert. denied, 2006 WL 386903 (Feb. 21, 2006); Gray v. United States, No. 05-8141, cert. denied, 126 S. Ct. 1157 (2006); Garcia v. United States, No. 05-8140, cert. denied, 126 S. Ct. 1157 (2006); Cotney v. United States, No. 05-8075, cert. denied, 126 S. Ct. 1119 (2006). There would be no reason for a different result here.

Torres, Suazo-Izaguirre, Alejo-Agramon, Eguia-Hernandez, Armendariz-Chavez, Palencia-Contreras, and Vences only in No. 05-7496, should be held pending the Court's disposition of the petition for a writ of certiorari in Lopez v. Gonzales, No. 05-547, and then disposed of in accordance with the Court's disposition of that case. With respect to all other questions presented in No. 05-7496, the petition should be denied. In addition, with respect to petitioners Colatos-Rivas, Guardado-Ortega, Loredo-Pecina, and Ramirez-Maldonado in No. 05-7496, the petition should be denied in its entirety.

Respectfully submitted.

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FEBRUARY 2006

No. 05-7496 and 05-7664

IN THE SUPREME COURT OF THE UNITED STATES

CECILIO MENDOZA-TORRES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

REYMUNDO TOLEDO-FLORES, PETITIONER

v.

UNITED STATES OF AMERICA

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES**, via e-mail and first-class mail, postage prepaid, this **27th day of February, 2006**.

[See Attached Service List]

Paul D. Clement/m

Paul D. Clement
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February 27, 2006

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Emily C. Spadoni, Supervisor Case Management, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Spadoni's direct dial phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

05-7496
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No. 05-7664

In The Supreme Court of the United States

REYMUNDO TOLEDO-FLORES,

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v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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RELEVANT DOCKET ENTRIES

* * *

2/22/2004	ARREST of Reymundo Toledo-Flores
3/16/2004	INDICTMENT as to Reymundo Toledo-Flores (1) count(s), filed.
3/24/2004	Arraignment held before Magistrate Judge Marcel C. Notzon Ct Reporter: P Galvan/ERO; Tape Number: 1; Interpreter: D Gonzalez. Appearances: R Jones f/gvt; FPD R Martinez f/dft, filed. Plea of Not Guilty: Reymundo Toledo-Flores (1) count(s) 1 Scheduling dates set; dft remanded to custody.
5/3/2004	Re-Arraignment held before Judge George P. Kazen Ct Reporter: Val Castano; Interpreter: I Poole; Appearances: M Rinka f/S Hacker f/gvt; FPD R Martinez f/dft, filed. Plea of Guilty: Reymundo Toledo-Flores (1) count(s) 1 (Terminated motions –) Oral plea of guilty to ct 1; order for psi, due 06/08/04; dft remanded to custody.
9/9/2004	Minute Entry for proceedings held before Judge George P. Kazen: *** Sentencing held on 9/9/2004 for Reymundo Toledo-Flores (1), Count(s) 1, 24 mos to serve this case, consecutive to 6 mos to serve in 5:00m165, revoked; 1 yr tsr; no fine; $100 cvf; dft to be deported; 10 days to appeal. Appearances: Federal Public Defender Raul Martinez f/dft, Diana Saldana f/gvt. (Court Reporter: Leticia E Verdin) (Interpreter: Beatriz Zapata) Deft remanded to custody, filed.
9/10/2004	JUDGMENT as to Reymundo Toledo-Flores (1) Count 1. (Signed by Judge George P. Kazen). Parties notified. (dflores) (Entered: 9/17/2004)

9/16/2004	NOTICE OF APPEAL to US Court of Appeals by Reymundo Toledo-Flores, filed.
10/5/2005	JUDGMENT of USCA Fifth Circuit (certified copy) 08/17/05; Issued as Mandate 09/21/05; Affirming the judgment of the district court as to Reymundo Toledo-Flores as to [12] Notice of Appeal – Judgment and Sentence Reymundo Toledo-Flores (1) Count 1 USCA No. 04-41378, filed.
10/5/2005	Certified Copy of Fifth Circuit Court of Appeals PER CURIAM as to Reymundo Toledo-Flores re [12] Notice of Appeal – Judgment and Sentence (USCA No: 04-41378), filed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA,	§	CRIMINAL NO.
	§	
v.	§	L-04-546
	§	(Filed Mar. 16, 2004)
REYMUNDO TOLEDO-FLORES	§	

INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT ONE

On or about February 22, 2004, in the Southern District of Texas and within the jurisdiction of the Court, **Defendant,**

REYMUNDO TOLEDO-FLORES,

an alien, having been previously convicted for illegal entry, did knowingly enter the United States at a place other than as designated by Immigration officers.

In violation of Title 8, United States Code, Section 1325.

A TRUE BILL:

/s/ Illegible
FOREMAN OF THE
GRAND JURY

MICHAEL T. SHELBY
UNITED STATES ATTORNEY
/s/ Illegible for
SCOTT HACKER
Assistant United States Attorney

[1] REPORTER'S RECORD

VOLUME 1 OF 1

TRIAL COURT CAUSE NO. L-04-546

UNITED STATES OF AMERICA	)	U. S. DISTRICT COURT
VS.	)	SOUTHERN DIST. OF TEXAS
REYMUNDO TOLEDO-FLORES	)	LAREDO DIVISION

VOLUME 1 OF 1

REARRAINGMENT [sic] **HEARING**

REPORTER'S RECORD

On the **3rd day of May, 2004,** the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable George P. Kazen, Judge Presiding, held in the United States District Court, Laredo, Texas.

Proceedings reported by machine shorthand.

* * *

[4] PROCEEDINGS

May 3, 2004

THE COURT: All right. Let's see what we've got here. Martin-Rodriguez, possibly Martin Rodriguez Perez. Juan Antonio Baez Perez. Is it Baez?

CLERK: Baez.

THE COURT: Juan Antonio Baez-Perez. Juan Prado-Reyes. Lazaro Lopez-Garcia. Raymundo [sic] Toledo-Flores. Juan Araiza-Carrizales. Daniel Ledesma-Esparza.

Raymundo de La Cruz-Madrigal. Jose Mânuel Moreno-Iraheta.

All right. Martin-Rodriguez; is that you?

(The court identified each defendant.)

THE COURT: Reymundo Toledo-Flores?

THE DEFENDANT: Here.

(The court continues to identify each defendant.)

THE COURT: I've asked you to come up together because you are all charged with the identical crime, and if you are going to plead guilty, then I have to say certain things to you [5] that would be identical and it just saves time. You see that we're already into our third hour of doing this, and we would be here into the evening if we took everybody separately. So it's better for you and for all of us if we can take some of you together.

The charge is that each of you is an alien; that you are not a citizen of the United States of America; that sometime in your life you have already been convicted in a court in this country for illegal entry; and after that, you have done it again. These are all cases from February and March.

You have again illegally entered this country and, specifically, the charge is that you crossed into this country at a place that is not designated by the immigration authorities.

Every alien is supposed to enter through an official doorway where you present your credentials. And it could be an airport or it could be a seaport, but in this part of the nation it's the bridges that connect into Mexico over

the river and you have to come through that port and show your papers to the immigration office.

So the charge is that you didn't do [6] that, that you crossed somewhere else. And usually that means that you just swam the river somewhere or walked through the water somewhere along the many, many miles of boundary.

And that's an illegal entry, and that you already have one conviction for doing that. So that's the charge.

(The court gives latest date of illegal entry to each defendant and receives each defendant's plea of guilty to the charge.)

THE COURT: Toledo, your last entry is alleged to be February 22nd. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: How do you plead to that?

THE DEFENDANT: Guilty.

(The court continues with the other defendants.)

THE COURT: Would each of you raise your right hand and swear to speak the truth here today.

(All defendants sworn.)

THE COURT: I am going to tell you what happened now. I hope you know this already. [7] Your lawyer should have told you all of this already, but if I tell you something that's different or news to you and it bothers you, stop and talk to me about it and I'll try to answer any of your questions, but please do not lie. If you lie, that's a new crime. That's a separate crime and probably a

more serious crime and you can be prosecuted separately for that.

Are you under the influence of any narcotic right now or alcohol or do you have any history in your own life of mental illness or brain disease or psychiatric problems or anything like that?

Mr. Rodriguez?

THE DEFENDANT: No, sir.

(The court continues with the other defendants.)

THE COURT: Toledo?

THE DEFENDANT: No, sir.

(The court continues with the other defendants.)

THE COURT: Is this your own decision after talking to your lawyer and thinking about it, is this your own voluntary decision as to what you want to do in this case?

[8] As far as pleading guilty, is that your own voluntary decision, Mr. Rodriguez?

THE DEFENDANT: Yes.

(The court continues with the other defendants.)

THE COURT: Toledo?

THE DEFENDANT: Yes, sir.

(The court continues with the other defendants.)

THE COURT: The maximum penalty that you could get is two years in prison. That's the worst you can get, and you probably are not going to get that much

because I have to follow guidelines and they generally don't go that high. So you probably will not get that much, but that's the worst you can get.

You also could possibly get a fine of anywhere from $100 up to $250,000. For sure, I am supposed to tax you or assess you $100 in costs and place you on supervision for a year from the day that you finish your sentence.

That means that you will be released and you will be sent back to your country, but you are supposed to be technically on supervision for a year.

[9] In reality, we cannot supervise you in another country. So in your cases, what that means is that we will just keep these files open. These are your personal files and we will just keep these files open for a year from the time that you finish your sentence.

If we don't see you during that time, then we'll close the file, but if we see you again, if you turn around and come back again within a year, then you will get some more time in this case, up to an extra year in prison even though you had already served the original sentence and even though you had been out for a while. So that's what you're facing overall.

Do you understand, Mr. Rodriguez?

THE DEFENDANT: Yes, sir.

(The court continues with the other defendants.)

THE COURT: Toledo?

THE DEFENDANT: Yes, sir.

(The court continues with the other defendants.)

THE COURT: There is typically no bargaining in these cases, but I will ask you if you think you got a bargain. Do you think that you [10] made some kind of deal with the prosecutor or the immigration or the border patrol or anybody else that has induced you to plead guilty or are you expecting some special kind of benefit or reward. You need to tell me so that I can tell you if it's a legitimate promise or not. Do you think you've got any plea bargain going here, Mr. Rodriguez?

THE DEFENDANT: No. sir.

(The court continues with the other defendants.)

THE COURT: Toledo?

THE DEFENDANT: No, sir.

(The court continues with the other defendants.)

THE COURT: In our system here, you are not required to plead guilty. You have the absolute right to plead not guilty and demand a trial. You can ask to be tried by a judge or by a jury of twelve men and women.

You would be present at the trial. You can confront and cross-examine the witnesses brought against you by the government. You could bring your own witnesses. You could be a witness in your own case, but you would also have the right to be silent. Nobody could force you to testify, [11] nobody could make you say anything at all.

And I don't know if I said this, but if you went to trial you could ask for one judge to decide the case or you could ask for 12 people, which is what we call a jury, 12 citizens, and your lawyer would sit with you right here in a public trial.

The interpreter would sit with you; your lawyer could challenge and confront the government witnesses. And, as I said, you can call other witnesses or be a witness, but you could also be silent.

A guilty plea ends all of that. A guilty plea means that your case will be finished here in the next five or ten minutes. There will be no trial. No jury. No witnesses. The government will not have to prove anything. We will just take your word for it that you are guilty, and that's it. I'll sentence you as soon as I can.

But aside from the sentence, your matter would end here in the next few minutes and you would give up those rights that I have been talking about.

Do you understand, Mr. Rodriguez?

[12] THE DEFENDANT: Yes, sir.

THE COURT: Do you still want to plead guilty?

THE DEFENDANT: Yes, sir.

(The court continues with the other defendants.)

THE COURT: Mr. Toledo?

THE DEFENDANT: Yes, sir.

(The court continues with the other defendants.)

THE COURT: How old are you, Mr. Rodriguez?

THE DEFENDANT: 38 years.

(The government presents a factual statement and court accepts plea.)

(The court continues with the other defendants.)

THE COURT: Mr. Toledo, how old are you, sir?

THE DEFENDANT: 25.

THE COURT: Where are you from?

THE DEFENDANT: Michuoacan [sic], Mexico.

THE COURT: How much education do you have?

THE DEFENDANT: Elementary.

[13] THE COURT: Are you married?

THE DEFENDANT: Yes.

THE COURT: Do you have children?

THE DEFENDANT: Yes; two.

THE COURT: Where are they?

THE DEFENDANT: In Houston.

THE COURT: Born there?

THE DEFENDANT: Yes.

THE COURT: Where is your wife from?

THE DEFENDANT: Houston.

THE COURT: She's a U. S. citizen?

THE DEFENDANT: Yes.

THE COURT: How long were you living in Houston?

THE DEFENDANT: Fourteen weeks.

THE COURT: Did your family bring you over or what?

THE DEFENDANT: Yes.

THE COURT: How long have you been married?

THE DEFENDANT: Six years.

THE COURT: Did you ever try to get any papers to be here?

THE DEFENDANT: No.

THE COURT: What kind of work do you [14] do in Houston?

THE DEFENDANT: Gutters. For the rain.

THE COURT: You clean them or what?

THE DEFENDANT: No. We install them.

THE COURT: What's his story?

MR. RINKA: Judge, the defendant is a native and citizen of Mexico with no documents to enter or pass through or remain in the United States.

The defendant was apprehended by the U.S. Border Patrol on the 23rd of February of [sic] near the Benitez County fence line near the 16-mile marker of I-35 north of Laredo, Texas.

At the time he was arrested the defendant admitted that he had last entered the United States illegally from Mexico by wading the Rio Grande River near the World Trade Bridge on the 22nd of February of 2004 and he waded the river and entered the United States at a place

other than that designated by immigration officials as a port of entry.

The defendant was last convicted of illegal entry on the 17th of November of 2000 in [15] Del Rio, Texas.

THE COURT: Is that right? You have a conviction about three and a half years ago back in Del Rio for illegal entry?

THE DEFENDANT: Yes, sir.

THE COURT: And then you swam the river here in February?

THE DEFENDANT: Yes, sir.

THE COURT: Had you been in Mexico for a while or did you just go over to visit?

THE DEFENDANT: No.

THE COURT: You were coming out of Mexico in February; right?

THE DEFENDANT: Yes.

THE COURT: How long had you been in Mexico.

THE DEFENDANT: One week.

THE COURT: Why did you go there for a week?

THE DEFENDANT: Because they deported me to Mexico.

THE COURT: Oh, you had been kicked out after in the last – this year you were thrown out of the United States also?

THE DEFENDANT: Yes.

[16] THE COURT: Is that here in Laredo or somewhere else?

THE DEFENDANT: In Laredo.

THE COURT: You don't have that in your . . . ?

MR. RINKA: We've got just that when they picked him up in February, they ran a check and there was 15 prior illegal entries back and forth.

THE COURT: So even after his prior conviction?

MR. RINKA: Yes. I don't know the specific dates, but the last prior conviction that we know of is the 2000 conviction.

THE COURT: Okay. I'll accept the plea, Mr. Toledo. We'll get back to you as soon as we can. Do you have any questions?

THE DEFENDANT: No.

(The court continues with the other defendants.)

(End of proceedings.)

[17] [Court Reporter's Certificate Omitted In Printing]

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA	*	L-04-546
VS	*	LAREDO, TEXAS
REYMUNDO TOLEDO-FLORES	*	SEPTEMBER 9, 2004

TRANSCRIPT OF REARRAIGNMENT
[sic: should be "SENTENCING"]

BEFORE THE HONORABLE GEORGE P. KAZEN
UNITED STATES DISTRICT JUDGE

---

* * *

[2] THE COURT: All right. Reymundo Toledo-Flores, 546.

Are you Reymundo Toledo-Flores?

DEFENDANT TOLEDO FLORES: Yes, sir.

THE COURT: I have to sentence you for illegally entering this country in February. And at the time you did that you were on probation for doing the same thing in the year 2000.

No. Wait a minute. That's not right. Is he – why did I write that down? What case is he on probation for?

PROBATION OFFICER: Case Number 500 –

THE COURT: Number what?

PROBATION OFFICER: 165, Your Honor.

THE COURT: Yeah, but what paragraph is it here?

PROBATION OFFICER: Paragraph 19, Your Honor.

THE COURT: Oh, there it is.

Okay. You were put on probation for five years in the year 2000. And that was here in Laredo. And so you were supposed to stay out of trouble until January of 2005, but instead you came back in – well, this latest time was in February of this year. You actually had come back before then, apparently, because you were in trouble again. You were – yeah, you didn't wait too [3] long, really.

You were – you were put on probation here in January of 2000 and by December – by October of 2000 you're already back in trouble again in Harris County for criminal mischief. And then you went out and got another illegal entry in Del Rio later in 2000. Then in 2001, you had an assault case in Harris County.

So you've – you've come and gone a lot even though you've been supposedly sent away. And then in 2002, you were in a drug case where you got sentenced to seven months confinement in Harris County. And even that didn't deter you. You were removed in November of '02 and were back again in November of '03 getting in some other brush with the law in Houston. And then '04, driving while intoxicated. So you've been coming in – in and out like a swinging door here for the last three or four years.

And you have a whole series of voluntary departures going back to 1988. You're the third one this morning that was charged, I won't say wrong, but, I mean, you were – you were charged with a lower offense than you should

have been charged with. You actually score – if you – if your lawyer read the report to you, you actually score at Line 13, Column 6, which means that you're supposed to get 33 to 41 months, but you're not [4] going to get that much. The worst you can get is 24 months, because of the way you were charged.

Anything you want to talk about before the sentence is imposed?

DEFENDANT TOLEDO-FLORES: Just forgive me for everything I've done. But everything I've done, I've paid for it in jail. To give me a fair amount of time so I can go back and be with my family.

THE COURT: Well, we'd love for you to go back and be with your family. The trouble is we can't keep you there. I mean, even leaving aside all your problems in Houston, this will be the third time you've been in a court – a federal court for immigration charges. And I'm sure each time you told the judge "This is it for me," and you were back again almost immediately.

You're just not getting the message. You're not getting the message that you don't belong here and you can't be here. And you better get the message, because you're only 25 years old and you've already – you're already in Column 6, and you're going to keep adding on to that. You've got a lot of years to keep adding on to that if you don't stop coming over here. I'm sure – I can guarantee you that the next time the prosecutors, or at least I hope, will not undercharge you. In which case, you know, you'll be getting close to five years in [5] prison. Anyway.

Anything else?

DEFENDANT TOLEDO-FLORES: That's all.

THE COURT: Anything else, Mr. Martinez?

MR. MARTINEZ: Your Honor, I filed two objections, both of them for preservation purposes only. One is the argument that's – we're hoping the Fifth Circuit will recognize that, that simple possession of a controlled substance is not an aggravated felony. And the other one is the Blakely, Almendarez-Torres objection, as well.

THE COURT: All right. Okay. The objections are overruled.

Anything else, Mr. Toledo?

DEFENDANT TOLEDO-FLORES: No, sir.

THE COURT: In the probation case, I'll revoke the probation and order you to serve six months. In this case, even though you score a lot higher, I'll sentence you to 24 months. That's a total of 30 months, because they're consecutive. That's the bad news.

I'll tell you the good news. The good news is that 30 months for the two cases combined is still less than the least you should have gotten, just in this case alone, had the Government charged you with what they should have charged you with. So you still came away [6] with a discount. That's number one.

Number two, you've already served seven months that you can subtract from that. So the – so when I revoked the probation and ordered you to serve six months, that part of the sentence you've already served. And you will be eligible for good time credits of 52 days a year. So, you know, you've got some time left, but not – probably not as much as it looks. The point is that we don't seem to be able to convince you to stay home.

So all I can tell you is that, when you get out, your file will stay open for a year. We call it supervised release, but we're not going to – we can't supervise you, but your file will be open for a year. If you come back in the first year, you will get some more time in this case. And, of course, you'll get new charges. Even if you wait a year, you'll always get new charges. Just – just like now, this is the third illegal entry charge you've got, and you'll always get new charges, because you don't have papers. And with this record, you're not ever going to get papers.

I'll waive the fine, but I do have to assess you $100.00 of cost. You can appeal to another court. It's free. You just have to say that you want to, but you have to say it either right now or in the next 10 days. [7] Otherwise, you lose the right to appeal.

Do you wish to appeal or not, or do you want to wait and think about it?

DEFENDANT TOLEDO-FLORES: No, it's fine.

THE COURT: All right. Well, if – you can change your mind as long as you do it within the next 10 days.

* * *

[8] [Court Reporter's Certificate Omitted In Printing]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-41378

Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

REYMUNDO TOLEDO-FLORES,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:04-CR-546-ALL

[FILED IN THE U.S. COURT OF APPEALS-
AUGUST 17, 2005]

Before BENAVIDES, CLEMENT, and PRADO, Circuit Judges.

PER CURIAM:*

Reymundo Toledo-Flores (Toledo) appeals the two-year sentence imposed following his guilty-plea conviction for

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

improper entry by an alien. Toledo argues that the district court erred by imposing the eight-level increase in U.S.S.G. § 2L1.2(b)(1)(C) (2003) for having a prior aggravated felony conviction. Toledo contends that his Texas state conviction for possession of cocaine is not a qualifying aggravated felony because it is not a felony under the federal Controlled Substances Act. Although Toledo conceded before the district court that this argument was foreclosed by *United States v. Rivera*, 265 F.3d 310 (5th Cir. 2001), and *United States v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997), on appeal he asserts that these decisions are not binding because they conflict with *Jerome v. United States*, 318 U.S. 101 (1943).

Our precedent is clear that Congress has made a "deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only a misdemeanor under the [Controlled Substances Act]." *United States v. Hernandez-Avalos*, 251 F.3d 505, 510 (5th Cir. 2001) (internal quotation marks and citation omitted). A prior conviction for a state drug offense will qualify as an aggravated felony under U.S.S.G. § 2L1.2(b)(1)(C) if it is punishable under the Controlled Substances Act and it is punishable by more than a year of imprisonment under the applicable state law. *See United States v. Sanchez-Villalobos*, 412 F.3d 572, 576 (5th Cir. 2005). Toledo's prior offense meets this definition. *See* 21 U.S.C. § 844(a) (2003); TEX. HEALTH AND SAFETY CODE ANN. §§ 481.102(3)(D) & 481.115 (Vernon 2001); TEX. PENAL CODE ANN. § 12.35(a) (Vernon 2001). Accordingly, the judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-41378

Conference Calendar

D.C. Docket No. 5:04-CR-546-ALL

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

REYMUNDO TOLEDO-FLORES

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas, Laredo

[FILED IN THE U.S. COURT OF APPEALS-
AUGUST 17, 2005]

[FILED IN THE U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF TEXAS-OCTOBER 5, 2005]

(JURAT OMITTED IN PRINTING)

Before BENAVIDES, CLEMENT and PRADO, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

ISSUED AS MANDATE: SEP 21 2005

SUPREME COURT OF THE UNITED STATES

No. 05-7664

Reymundo Toledo-Flores

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit, No. 04-41378.

ON CONSIDERATION of the motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari herein to the United States Court of Appeals for the Fifth Circuit.

IT IS ORDERED by this Court that the said motion and the petition are granted[.] The petition for a writ of certiorari in No. 05-547, Lopez v. Gonzales, is granted. The cases are consolidated and a total of one hour is allotted for oral argument.

April 3, 2006

(JURAT OMITTED IN PRINTING)

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NOS. 05-7496 and 05-7664 (8)

IN THE SUPREME COURT OF THE UNITED STATES

CECILIO MENDOZA-TORRES, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

REYMUNDO TOLEDO-FLORES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED

As to all petitioners:

I. Has the Fifth Circuit erred in holding - in opposition to the Second, Third, Sixth, and Ninth Circuits - that a state felony conviction for simple possession of a controlled substance is a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) and hence an "aggravated felony," under 8 U.S.C. § 1101(a)(43)(B), even though the same crime is a misdemeanor under federal law?

As to the petitioners in No. 05-7496 only:

II. For purposes of the third prong of plain-error review under Fed. R. Crim. P. 52(b), is the plain error of treating the Federal Sentencing Guidelines as mandatory (in contravention of this Court's decision in United States v. Booker, 125 S. Ct. 738 (2005)) a ***structural*** error that necessarily affects a defendant's substantial rights?

(SUBSIDIARY QUESTION: Should this Court hold this case pending this Court's resolution of a similar question in Washington v. Recuenco, No. 05-83, cert. granted, 126 S. Ct. 478 (Oct. 17, 2005)?)

III. Even if this type of Booker error is not structural, has the Fifth Circuit nevertheless misapplied this Court's decision in United States v. Dominguez Benitez, 542 U.S. 74 (2004), by requiring more than a "reasonable probability" that this error affected a defendant's sentence?

IV. Should this Court grant certiorari to resolve the deep, three-way circuit split respecting the proper application of the plain-error rule to unpreserved Booker error?

V. Should this Court overrule its prior decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), and hold that, where the fact of a prior conviction raises the applicable statutory maximum, the Constitution requires that such prior conviction be alleged in the indictment (in federal prosecutions) and proved to a jury beyond a reasonable doubt?

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PREAMBLE

Pursuant to Supreme Court Rule 15.8, petitioners Cecilio Mendoza-Torres, et al., in No. 05-7496, and petitioner Reymundo Toledo-Flores in No. 05-7664, hereby file the following joint Supplemental Brief in support of their respective petitions for a writ of certiorari.[1]

SUPPLEMENTAL BRIEF OF PETITIONER

The Seventh Circuit's Recent Published Decision in Gonzales-Gomez v. Achim, ____ F.3d ____, 2006 WL 708678 (7th Cir. Mar. 22, 2006), Directly Conflicts With the Fifth Circuit's Rulings in These Cases, Thereby Widening the Split of Authority on the First Question Presented.

Very recently, on March 22, 2006, the Seventh Circuit issued a published decision that conflicts with the Fifth Circuit's decisions in these cases respecting the first question presented, namely, "the question whether a state-law felony that would be punishable only as a misdemeanor by federal law is nevertheless an 'aggravated felony.'" Gonzales-Gomez v. Achim, No. 05-2728, ____ F.3d ____, 2006 WL 708678, at *1 (7th Cir. Mar. 22, 2006). The Seventh Circuit, speaking through Judge Posner, answered that question in the negative, see id. at *1-*4; and it explicitly noted that the Fifth Circuit had reached a different result. See id. at *1 (citing United States v. Hernandez-Avalos, 251 F.3d 505, 507-08

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[1] Petitioners file jointly because the government filed a single consolidated response to both of these petitions.

(5th Cir. 2001)).

In rejecting the government's contrary arguments, the Seventh Circuit held that the government's interpretation of the statutes at issue "[was] a strained reading of the statutory language, [was] inconsistent with the interest in uniform standards for removal, and [was] inconsistent with the legislative history." Id. And, indeed, Gonzales-Gomez is notable for its thoughtful analysis of the statutory language, legislative history, and policy considerations at play in this issue. See id. at *1-*4.

Although Gonzales-Gomez was an immigration case, rather than a criminal case, its interpretation of the statute is equally valid in the latter context. Cf. Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) (declining to interpret 18 U.S.C. § 16 differently in the immigration context than in the criminal law context "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context . . ."). And Gonzales-Gomez's strongly-worded rejection of the Fifth Circuit's position on this question, thereby increasing the dissension among the circuits on this question, makes it even more important for this Court to decide this question, whether in Lopez v. Gonzales, No. 05-547, in the present cases, or in some other case.

For the foregoing reasons, as well as those previously expressed, this Court should, at a minimum, hold *both* of these petitions, as to *all* petitioners, pending the disposition of the petition for writ of certiorari in Lopez v. Gonzalez, No. 05-547; and, if certiorari is granted in Lopez, then further hold these

petitions (again as to all petitioners) pending a decision in Lopez. Alternatively, this Court should grant certiorari to decide this question in one or more of petitioners' cases,[2] and then hold the balance of petitioners' cases pending a decision thereon.

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[2] In their joint reply to the Brief for the United States, counsel recommended, in the event that the Court chose to follow this course, that this Court grant certiorari (1) as to petitioner Mendoza-Torres in No. 05-7496; and/or (2) as to petitioner Toledo-Flores in No. 05-7664. See Pet'rs'. Reply Br. 6.

CONCLUSION

For the foregoing reasons, as well as those set forth in the original petitions for writ of certiorari and the petitioners' joint reply to the Brief for the United States, the above-captioned petitioners pray that this Court grant certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in their cases.

Date:
March 23, 2006

Respectfully submitted,

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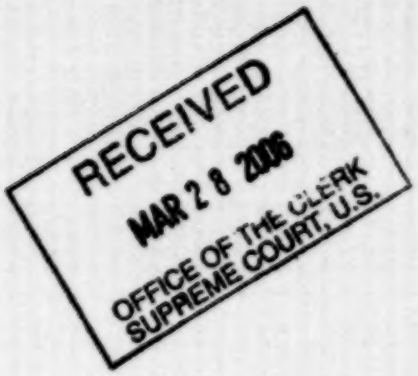
NOS. 05-7496 and 05-7664

IN THE SUPREME COURT OF THE UNITED STATES

CECILIO MENDOZA-TORRES, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.



REYMUNDO TOLEDO-FLORES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

TIMOTHY CROOKS, a member of the Bar of this Court and appointed under the Criminal Justice Act, certifies that, pursuant to Rule 29.5, he served the preceding Petitioners' Supplemental Brief of Petitioiners in Support of Petitions For Writ of Certiorari on counsel for the Respondent by enclosing a copy of these documents in an envelope, to be delivered at defense counsel's expense, by Federal Express, No. 8493 0128 3926, and addressed to:

The Honorable Paul D. Clement
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave. NW
Washington, D.C. 20530

and depositing the envelope in the Federal Express Drop Box, 440 Louisiana, Houston, Texas 77002, today, March 23, 2006, and by electronic mail today to the Office of the Solicitor General at SupremeCtBriefs@USDOJ.gov. He further certifies that all parties required to be served have been served.

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March 23, 2006

FEDERAL EXPRESS NO. 8278 9680 3730
Mr. William K. Suter, Clerk
Supreme Court of the United States
1 First Street NE
Washington, D.C. 20543

Re: Petitioners' Supplemental Brief in Support of Petitions For Writ of Certiorari
Cecilio Mendoza-Torres v. United States,
Reymundo Toledo-Flores v. United States

Dear Mr. Suter:

Enclosed are the original and ten copies of the Petitioners' Supplemental Brief in Support of Petitions For Writ of Certiorari for filing in the case of Cecilio Mendoza-Torres, et al., Petitioners v. United States of America, Respondent; and the original and ten copies of the Petitioners' Supplemental Brief in Support of Petitions For Writ of Certiorari for filing in the case of Reymundo Toledo-Flores, Petitioner v. United States of America, Respondent.

As indicated in the enclosed certificate of service, a copy of the Petitioners' Supplemental Brief in Support of Petitions For Writ of Certiorari has been mailed to the Solicitor General of the United States.

Very truly yours,

Timothy Crooks for

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

MAM:mkc
Enclosures

cc: The Honorable Paul D. Clement **FEDERAL EXPRESS NO. 8493 0128 3926**
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Nos. 05-547 and 05-7664

In the Supreme Court of the United States

JOSE ANTONIO LOPEZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

REYMUNDO TOLEDO-FLORES

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND EIGHTH CIRCUITS

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QUESTION PRESENTED

The Immigration and Nationality Act attaches a variety of consequences to an alien's commission of an "aggravated felony." That Act defines "aggravated felony" to include "a drug trafficking crime (as defined in section 924(c) of title 18)"—which, in turn, defines the phrase to mean "any felony punishable under the Controlled Substances Act" (18 U.S.C. 924(c)(2))—"whether in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004). The federal Sentencing Guidelines adopt that same definition of "aggravated felony." U.S.S.G. § 2L1.2(b)(1)(C) and comment. (n.3(A)). The question presented is:

Whether a state conviction for a controlled substance offense that is a felony under state law, and that is punishable under the Controlled Substances Act, albeit generally as a misdemeanor, qualifies as an "aggravated felony" under the Immigration and Nationality Act.

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In the Supreme Court of the United States

No. 05-547

JOSE ANTONIO LOPEZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

No. 05-7664

REYMUNDO TOLEDO-FLORES

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FIFTH AND EIGHTH CIRCUITS

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals in No. 05-547 (05-547 Pet. App. 1a-7a) is reported at 417 F.3d 934. The decisions of the Board of Immigration Appeals (05-547 Pet. App. 8a-9a) and of the immigration judge (05-547 Pet. App. 10a-20a) in that case are unreported. The opinion of the court of appeals in No. 05-7664 (05-7664 J.A. 20-21) is not published in the *Federal Reporter*, but is *reprinted in* 149 Fed. Appx. 241.

JURISDICTION

The court of appeals entered its judgment in No. 05-547 on August 9, 2005. The petition for a writ of certiorari was filed on October 31, 2005. The court of appeals entered its judg-

ment in No. 05-7664 on August 17, 2005. The petition for a writ of certiorari was filed on November 15, 2005. The Court granted certiorari in both cases on April 3, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set out in Appendix B, *infra*, and at 05-547 Pet. Br. App. 1a-11a.

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), an alien who is convicted of an "aggravated felony," as defined in 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004), may be ordered removed from the United States, 8 U.S.C. 1227(a)(2)(A)(iii). An alien also may be removed if he is convicted of violating "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21)," unless it was a "single offense involving possession for one's own use of 30 grams or less of marijuana." 8 U.S.C. 1227(a)(2)(B)(i).

Conviction of an "aggravated felony" limits the potential forms of relief from removal that are available to an alien. An aggravated felony conviction renders a lawful permanent resident ineligible to apply for cancellation of removal, 8 U.S.C. 1229b(a)(3) and (b)(1)(C), or the discretionary relief of asylum, 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i). An aggravated felony conviction does not disqualify an alien from withholding of removal, unless the term of imprisonment was five years or more and thus was "a particularly serious crime." 8 U.S.C. 1231(b)(3)(B)(ii).[1]

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[1] An alien with an aggravated felony conviction may obtain deferral of removal, but not withholding of removal, under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19, 1465 U.N.T.S. 85. See 8 C.F.R. 208.16(d)(2)-(3), 1208.16(d)(2)-(3). Furthermore,

In addition, conviction of an aggravated felony can affect an illegal alien's sentence for a recidivist illegal entry offense. It is a federal crime for an alien to enter the United States without authorization or proper inspection, or by providing false or misleading information to federal officials. 8 U.S.C. 1325(a). The maximum term of imprisonment for a first offense is six months in prison, but is two years for subsequent offenses. *Ibid.*[2] The United States Sentencing Guidelines authorize an eight-level upward adjustment in a defendant's offense level for illegal entry if the defendant was convicted of an "aggravated felony" before a prior removal from the United States. See U.S.S.G. § 2L1.2(b)(1)(C). In so doing, the Sentencing Guidelines adopt the INA's definition of "aggravated felony." *Id.* § 2L1.2, comment. (n.3(A)).[3]

b. The INA defines an "aggravated felony" by reference to a list of twenty-one categories of criminal offenses. Any offense "described in" that definition, "whether in violation of Federal or State law," is an aggravated felony. 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence). Any such offense "in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years" is also an aggravated felony. *Ibid.*

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aliens convicted of an aggravated felony are barred from seeking readmission following removal, but that bar is subject to waiver by the Attorney General. 8 U.S.C. 1182(a)(9)(A)(i) and (ii). Such aliens are also precluded from establishing "good moral character," 8 U.S.C. 1101(f)(8), and thus from being granted voluntary departure, 8 U.S.C. 1229c(b)(1)(B).

[2] Illegal reentry following a prior removal is also a criminal offense under 8 U.S.C. 1326. The maximum sentence is two years, unless the prior removal was subsequent to a conviction for an aggravated felony, which raises the maximum sentence to 20 years of imprisonment, 18 U.S.C. 1326(a) and (b)(2).

[3] Because the Sentencing Guidelines simply incorporate the INA's definition of "aggravated felony," Section 1101(a)(43)'s meaning in immigration law applies equally to sentencing proceedings.

That definition of "aggravated felony" includes "illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. 1101(a)(43)(B). Section 924(c)(2) of Title 18, in turn, defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)."[4]

Title 18 classifies a federal crime as a "felony" if "the maximum term of imprisonment authorized" exceeds one year. 18 U.S.C. 3559 (2000 & Supp. III 2003). The Controlled Substances Act, 21 U.S.C. 801 *et seq.*, defines "felony" generally as "any Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. 802(13). That Act further defines a "felony drug offense" as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. 802(44), as amended by the Anabolic Steroid Act of 2004, Pub. L. No. 108-358, § 2(a)(2), 118 Stat. 1663.

2. Petitioner Lopez is a native and citizen of Mexico who entered the United States illegally, but subsequently adjusted his status to that of lawful permanent resident. 05-547 Pet. App. 1a-2a, 11a. In 1997, after being granted lawful permanent resident status, Lopez was indicted in a South Dakota state court on one count of possessing cocaine, one count of distributing cocaine, and one count of conspiracy to distribute cocaine. 05-547 J.A. 41-43. Lopez ultimately pleaded guilty to aiding and abetting the possession of cocaine. 05-547 Pet. App.

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[4] Because these cases involve offenses that are punishable under the Controlled Substances Act, this brief's recitation of Section 924(c)(2)'s definitional language generally omits the other two laws for the sake of brevity.

13a; 05-547 J.A. 31-32. Under South Dakota law, Lopez's aiding and abetting offense was a felony punishable by up to five years of imprisonment. See S.D. Codified Laws § 22-42-5 (Michie 1988); *id.* § 22-6-1(7) (1988 & Supp. 1997). Also under South Dakota law, a person found guilty of aiding and abetting an offense "is legally accountable[] as a principal to the crime." *Id.* § 22-3-3 (West Supp. 2006); see *id.* § 22-3-3 (Michie 1988). Lopez was sentenced to five years of imprisonment, of which he served 15 months. 05-547 Pet. App. 14a; 05-547 J.A. 32.

The Immigration and Naturalization Service subsequently charged Lopez with being subject to removal based on his conviction of a controlled substance offense and an aggravated felony. 05-547 Pet. App. 12a.[5] With respect to the circumstances of his offense, Lopez testified at his immigration hearing that he "knew where you could get drugs in Huron at that time," that "he referred [Juan] Valdez to someone who did sell drugs," that he "helped him out to obtain the drugs," and that he had received money from Valdez. *Id.* at 13a; Admin. Rec. 98; see *ibid.* (Lopez states that he was "involved in the sale of illegal drugs," but "[o]nly that [one] time").

An immigration judge sustained both charges of removability. 05-547 Pet. App. 10a-20a. The immigration judge ruled first (*id.* at 16a) that Lopez was removable based on the controlled substance violation, a charge that was "not disputed." Relying on controlling precedent from the Board of Immigration Appeals (Board), the immigration judge further ruled that Lopez's state felony controlled substance offense constituted an aggravated felony because it was a drug trafficking crime under 8 U.S.C. 1101(a)(43)(B). See 05-547 Pet. App. 16a (citing *In re Yanez-Garcia*, 23 I. & N. Dec. 390

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[5] The Immigration and Naturalization Service's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. IV 2004).

(B.I.A. 2002)). Finally, the immigration judge ruled that Lopez's conviction of an aggravated felony statutorily disqualified him from obtaining the discretionary relief of cancellation of removal. 05-547 Pet. App. 20a. The Board affirmed in a brief opinion. 05-547 Pet. App. 8a-9a.

The court of appeals affirmed. 05-547 Pet. App. 1a-7a. As relevant here, the court held that Lopez's felony conviction constituted an "aggravated felony." *Id.* at 4a. Following its prior decision in *United States* v. *Briones-Mata*, 116 F.3d 308 (8th Cir. 1997) (per curiam), the court held that the "plain language" of Section 1101(a)(43) and the criminal law provisions it incorporates establish that "any felony punishable under the Controlled Substances Act," "under either state or federal law," is an aggravated felony. 05-547 Pet. App. 4a. Because Lopez's conviction was for a felony offense and was for conduct that was independently punishable under the Controlled Substances Act, the court held that it qualified as an "aggravated felony" (*id.* at 5a), which rendered Lopez ineligible for cancellation of removal (*id.* at 7a).

On January 4, 2006, Lopez was removed to Mexico, and he continues to pursue his claim for cancellation of removal from there. See 05-547 Gov't Pet. Stage Br. 6 n.5.

3. Petitioner Toledo-Flores is a native and citizen of Mexico who entered the United States illegally in February 2004, and was charged with illegal entry under 8 U.S.C. 1325. See 05-7664 J.A. 12-13. Toledo-Flores's immigration record revealed 15 prior illegal entries, including two prior federal convictions for illegal entry. *Id.* at 5, 14, 16-17. In fact, he had remained in Mexico for only one week between a prior deportation and his illegal entry in February 2004. *Id.* at 12-13. Toledo-Flores also has an extensive record of criminal conduct in the United States. He has state-court convictions for criminal mischief, assault, and driving while intoxicated. 05-7664 J.A. 16. In April 2002, Toledo-Flores was convicted in Texas

state court of possessing less than one gram of cocaine. *Id.* at 21; 05-7664 Pet. Br. 3. Under Texas law, that offense is a felony punishable by up to two years of imprisonment. See Tex. Health & Safety Code Ann. § 481.102 (West Supp. 2006); *id.* § 481.115 (2003); Tex. Penal Code Ann. § 12.35 (West 2003). The Texas court sentenced Toledo-Flores to seven months of imprisonment. Gov't C.A. Br. 4.

In sentencing Toledo-Flores for his illegal entry offense, the district court applied the Sentencing Guidelines' eight-level enhancement for a prior conviction of an aggravated felony, U.S.S.G. § 2L1.2(b)(1)(C), based on Toledo-Flores's felony drug conviction in Texas. See 05-7664 J.A. 21. The court sentenced Toledo-Flores to two years of imprisonment, to be followed by one year of supervised release. *Id.* at 1.

The court of appeals affirmed. 05-7664 J.A. 20-21. The court held that Congress had made a "deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only a misdemeanor under the [Controlled Substances Act]." *Id.* at 21 (quoting *United States* v. *Hernandez-Avalos*, 251 F.3d 505, 510 (5th Cir.), cert. denied, 534 U.S. 935 (2001)). Applying Fifth Circuit precedent, the court explained that Toledo-Flores's "prior conviction for a state drug offense * * * qualif[ied] as an aggravated felony under U.S.S.G. § 2L1.2(b)(1)(C) [because] it is punishable under the Controlled Substances Act and it is punishable by more than a year of imprisonment under the applicable state law." *Id.* at 21.

Toledo-Flores completed the term of imprisonment under his federal sentence on April 21, 2006, and was removed to Mexico. He will remain on inactive supervised release until April 20, 2007.

SUMMARY OF ARGUMENT

I. Petitioner Toledo-Flores's case is moot. His sole challenge is to the aggravated-felony enhancement of his term of imprisonment. He has now completed that prison term and has been removed from the United States. Accordingly, a ruling in his favor would have no practical effect. While he remains on supervised release, his supervision is inactive, imposes no constraints on his liberty, and, in any event, would not be affected by a ruling that the aggravated-felony enhancement was in error.

II. The plain text of the relevant statutory provisions makes state-law controlled substance felonies "aggravated felonies" under the INA. The operative language directs that "any felony" that is "punishable under the Controlled Substances Act" is a "drug trafficking crime," and thus an aggravated felony, "whether in violation of Federal or State law." 8 U.S.C. 1101(a)(43)(B) (incorporating 18 U.S.C. 924(c)(2)); 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence). "Any felony" naturally includes state-law felonies for conduct punishable under the Controlled Substances Act, given the INA's command that offenses be included "whether in violation of Federal or State law."

Petitioners, in fact, do not dispute that state-law felonies can be "drug trafficking crimes" for purposes of the INA's definition of "aggravated felony." Petitioners also do not dispute that possession and aiding and abetting possession of cocaine are offenses that are "punishable under the Controlled Substances Act." 18 U.S.C. 924(c)(2). Finally, petitioners agree that "felony" takes its meaning by reference to Title 18, where its established usage requires only that the offense be punished by more than one year in prison. Petitioners' convictions satisfy all of those prerequisites.

Petitioners, however, would add the requirement that a state-law drug felony also be punishable *as a felony* under federal law. That argument defies 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004), which directs that an offense is an "aggravated felony," "whether in violation of Federal law *or* state law," as long as the conduct is punishable under the Controlled Substances Act (emphasis added). Further, Section 1101(a)(43)'s broad and varied coverage of state-law crimes forecloses any notion that Congress intended the aggravated felony provision to conform to a federal model for qualifying offenses or, more particularly, be limited to crimes that the federal government itself would punish as a federal felony.

Nor does petitioners' argument have any home in the text of 18 U.S.C. 924(c)(2). Congress consistently employs the ordinary term "felony" to mean that the convicting jurisdiction has authorized a prison sentence of more than one year. Petitioners cite no instance in which the status of a crime as a "felony" turns on how the offense conduct would be sentenced by a jurisdiction other than the jurisdiction of conviction.

Further, petitioners' hypothetical-federal-felony approach would produce serious inequities, because the aggravated felony designation would turn upon the happenstance of the extent to which a State's controlled substances law overlaps with the federal statutory and prosecutorial model. Under petitioners' scheme, the possession of anything more than a personal-use amount of marijuana in a State that, like the federal government, charges such an offense as possession with intent to distribute, would be an aggravated felony. But that same alien's possession of 2000 pounds of marijuana in a neighboring State, which happens to target trafficking by using a graduated scheme of increasingly severe penalties for "possession" offenses, would not be an aggravated felony, despite an authorized sentence of decades in prison. Nothing in statutory text,

congressional purpose, principles of uniformity, or the rule of lenity warrants injecting such arbitrariness into the statute.

ARGUMENT

I. PETITIONER TOLEDO-FLORES'S CASE IS MOOT

Petitioner Toledo-Flores sought this Court's review of an increase in his sentence for illegal entry under the federal Sentencing Guidelines. See 05-7664 Pet. i, 5-6, 9-17; 05-7664 Pet. Br. 4. Because Toledo-Flores has never sought any form of relief from removal, his conviction of an aggravated felony has never been contested or even legally relevant in the context of immigration proceedings. And his sole claim for relief throughout this direct appeal from his criminal conviction and sentence has been the effect of his aggravated felon designation on the length of his term of imprisonment.

Following this Court's grant of certiorari, Toledo-Flores completed the term of imprisonment that he challenges, and he has been removed from the United States. Removal rendered his remaining term of supervised release "inactive." App. A, *infra*, 7a. As a result, Toledo-Flores's case is now moot, and the Court should dismiss his petition for lack of jurisdiction.

"To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (internal quotation marks and citations omitted). A case becomes moot when "the parties lack a legally cognizable interest in the outcome." *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 287 (2000) (citations omitted). Toledo-Flores now lacks any legally cognizable interest in the proper construction of "aggravated felony" under the Sentencing Guidelines. He has never challenged the merits of his conviction for illegal entry. The sole relief sought in his appeal and petition to this Court was a reduction in the length of his sentence of imprisonment.

But "[t]he [i]ncarceration that he incurred * * * is now over, and cannot be undone." *Spencer* v. *Kemna*, 523 U.S. 1, 8 (1998). Nor, as a removed alien, can Toledo-Flores establish any type of collateral consequence flowing from his now-completed sentence (as distinguished from his conviction) that is "adequate to meet Article III's injury-in-fact requirement." *Id.* at 14.

Toledo-Flores argues (Br. 5 n.3) that the case is not moot because he is still subject to a term of supervised release. That does not save this case from mootness for three reasons.

First, whatever the impact of the aggravated-felony enhancement on Toledo-Flores's completed term of imprisonment, he has never challenged the imposition of a term of supervised release, and he does not contend that the increase in his offense level had any effect on the length of his supervised release term. In fact, Section 3583(b)(3) of Title 18 authorizes a one-year term of supervised release for Toledo-Flores's illegal entry offense regardless of whether he was previously convicted of an aggravated felony. Furthermore, this Court has held unanimously that erroneously served prison time is not to be credited against a term of supervised release. *United States* v. *Johnson*, 529 U.S. 53, 57-60 (2000).

Second, reversal of the aggravated-felony increase in Toledo-Flores's offense level would not have any practical effect on the terms or conditions of his supervised release. Because Toledo-Flores is no longer in the United States, his supervision by the United States Probation Office is "inactive." App. A, *infra*, 7a. He is not presently under the jurisdiction, custody, or control of the United States Government. He has no obligation to report to any federal probation officials, and they are not monitoring or constraining his activities in any manner. As the district court explained, "[i]n reality, we cannot supervise you in another country." 05-7664 J.A. 8. "We call it supervised release, but we're not going to—we can't

supervise you." *Id.* at 19. The term of supervised release thus has no effect on Toledo-Flores's liberty and implicates no legally cognizable interest. There are no practical conditions on Toledo-Flores's release left for a district court to modify. See 18 U.S.C. 3583(e)(2) (2000 & Supp. III 2003); *Johnson*, 529 U.S. at 60. Nor can the district court shorten the term of supervised release, because that may be done only after the "expiration of one year of supervised release," 18 U.S.C. 3583(e)(1) (2000 & Supp. III 2003), and Toledo-Flores's entire term of supervised release is only one year.[6]

Third, the only lingering effect of Toledo-Flores's remaining few months of inactive supervised release is that, were he again to enter the United States illegally before his term expires, his supervised release would be reactivated and could be revoked, App. A, *infra*, 7a, and that new offense of illegal reentry could subject him to an enhanced sentence, see 8 U.S.C. 1326(b). But mootness principles are not designed to insulate a defendant in advance against the consequences of future crimes by permitting challenges to expired sentences or inoperative terms of supervision that implicate no current or ripe stake in the outcome of the case. Toledo-Flores himself is "able—and indeed required by law—to prevent" the adverse

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[6] For that reason, Toledo-Flores's reliance on *Johnson* v. *Pettiford*, 442 F.3d 917 (5th Cir. 2006), and *United States* v. *Rodriguez-Munoz*, No. 04-11321, 2006 WL 1209382, at *1, *3 (5th Cir. May 2, 2006), is misplaced. In both of those cases, the courts retained the power to modify the terms of supervised release because the individuals remained on active supervised release within the United States and were under the ongoing jurisdiction and control of federal probation officials. Contrast *Jago* v. *Van Curen*, 454 U.S. 14, 21 n.3 (1981) (release of an individual on parole did not render a case moot because he remained subject to parole "terms that significantly restrict his freedom"). In addition, because Rodriguez-Munoz was serving a three-year term of supervised release, the court had the power to shorten the term of supervised release after one year. See 18 U.S.C. 3583(e)(1) (2000 & Supp. III 2003); *Johnson*, 442 F.3d at 918; *Rodriguez-Munoz*, 2006 WL 1209382, at *1.

consequences he portends "from occurring." *Spencer*, 523 U.S. at 15 (quoting *Lane* v. *Williams*, 455 U.S. 624, 633 n.13 (1982)). Accordingly, "the case-or-controversy requirement [cannot be] satisfied by general assertions or inferences that in the course of [his] activities [Toledo-Flores] will be prosecuted for violating valid criminal laws." *O'Shea* v. *Littleton*, 414 U.S. 488, 497 (1974). The law "assume[s] that [Toledo-Flores] will conduct [his] activities within the law and so avoid prosecution and conviction." *Ibid.*

II. A STATE-LAW DRUG CRIME THAT IS BOTH A FELONY AND PUNISHABLE UNDER THE CONTROLLED SUBSTANCES ACT IS AN "AGGRAVATED FELONY," REGARDLESS OF WHETHER IT IS ALSO A FELONY UNDER FEDERAL LAW

Petitioners argue at length that the text of 18 U.S.C. 924(c)(2), standing alone, refers to federal felonies, and thus that any state-law conviction must also be a "hypothetical federal felony." *Gerbier* v. *Holmes*, 280 F.3d 297, 304 (3d Cir. 2002). That is wrong. It is also beside the point. Even if Section 924(c)(2) itself applied only to federal felonies, Congress eliminated that restriction for purposes of the Section's incorporation into the INA's "aggravated felony" provision. For purposes of 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004), Congress directed that any offense "described in" the "aggravated felony" definition shall qualify without regard to "whether [it is] in violation of Federal or State law," or even foreign law. *Ibid.* (penultimate sentence).

Further, despite their emphasis on federal law, petitioners ultimately agree that Section 924(c)(2)'s definition, as incorporated into 8 U.S.C. 1101(a)(43)(B), includes state felony convictions—albeit a specialized subset of them—for purposes of according an offense "aggravated felony" status. But there is no basis in statutory text, established usage, legislative his-

tory, or purpose for arguing that Congress's use of the ordinary term "felony" in Section 924(c)(2) encompasses only federal felonies plus that subset of state felonies deemed by courts, in hypothetical application, to be sufficiently analogous to federal felonies. Rather, when Section 924(c)(2)'s definition is read in a straightforward and commonsense manner, it requires that the offense (i) must be a "felony" under the law of the convicting jurisdiction, and (ii) the underlying conduct must be "punishable under the Controlled Substances Act."

A. The Statutory Definition Of "Aggravated Felony" Encompasses Large Categories Of Criminal Conduct Under State Law, Without Requiring A Federal-Law Parallel

The term "aggravated felony" in the INA is a "term of art created by Congress to describe a class of offenses that subjects aliens * * * to certain disabilities." *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 902 (9th Cir. 2002); see H.R. Rep. No. 681, 101st Cong., 2d Sess. Pt. I, at 147 (1990) ("aggravated felony" is a "defined term"). The term's coverage is sweeping, encompassing more than 20 broad categories of criminal conduct. See *Leocal* v. *Ashcroft*, 543 U.S. 1, 4 n.1 (2004). The list of qualifying offenses illustrates, moreover, that, despite the appellation, "aggravated felon[ies]" are not "a subset of felonies," and, in fact, "a misdemeanor can be an 'aggravated felony.'" *Robles-Rodriguez*, 281 F.3d at 903 (citing case examples); see, *e.g.*, 8 U.S.C. 1101(a)(43)(A), (G), (J), (P), (Q), (R) and (S) (including as "aggravated felon[ies]" a variety of child-molestation, theft, gambling, forgery, counterfeiting, failure-to-appear, bribery, vehicle trafficking, and obstruction of justice offenses); see generally *INS* v. *St. Cyr*, 533 U.S. 289, 295-297 & nn. 4, 6 (2001).

Congress defined some of the categories of qualifying offenses by reference to common names for crimes, such as mur-

der, rape, sexual abuse, theft, obstruction of justice, and forgery. See, *e.g.*, 8 U.S.C. 1101(a)(43)(A), (G), (R) and (S). For others, Congress referred to how a specified federal law "defined" or "described" the offense. See, *e.g.*, 8 U.S.C. 1101(a)(43)(C)-(F) and (H)-(P) (2000 & Supp. IV 2004). Congress specifically provided, however, that regardless of definitional format, a conviction for any "offense described in" Section 1101(a)(43) is an "aggravated felony," "whether [it was] in violation of Federal or State law," or "the law of a foreign country." 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence).

Congress thus focused the definition on categories of criminal convictions, without regard to the identity of the prosecuting authority. When Congress wanted to cull out from a particular offense category what it regarded as less serious crimes, Congress generally used as its benchmark neither the label attached to a crime nor the identity of the convicting jurisdiction (federal, state, or foreign), but rather the authorized term of imprisonment. See, *e.g.*, 8 U.S.C. 1101(a)(43)(F), (G), (J) and (P)-(T).[7]

B. The Incorporating Language In 8 U.S.C. 1101(a)(43) Eliminates Any Requirement That The Conviction Be For A Felony Under Federal Law

Whatever the meaning of 18 U.S.C. 924(c)(2) in isolation, Congress eliminated any arguable hypothetical-federal-felony requirement for purposes of Section 924(c)'s incorporation into the aggravated-felony provision of the INA. The INA provides, without qualification, that the definition of "aggravated felony" applies to a conviction for a drug trafficking crime described in Section 1101(a)(43)(B)—a felony based on conduct

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[7] For two financial crimes, Congress drew the line in terms of the dollar loss caused. 8 U.S.C. 1101(a)(43)(D) and (M).

that is punishable under the Controlled Substances Act—without regard to whether the offense was "in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence).

Indeed, as petitioners acknowledge (Lopez Br. 5; Toledo-Flores Br. 34-35), Congress added the "Federal or State law" language to the INA in 1990 "to end further litigation" and make clear that "drug trafficking * * * is an aggravated felony whether or not the conviction occurred in state or Federal court." H.R. Rep. No. 681, Pt. I, *supra*, at 147 (approving *In re Barrett*, 20 I. & N. Dec. 171 (B.I.A. 1990), which held that an alien's state-law drug trafficking crime rendered him an aggravated felon); see Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 5048.

To require federal-law confirmation that a state offense punishable by more than one year is a felony—that is, to require that the offense also be hypothetically not just punishable under federal law, but punishable as a felony under federal law—would not only ignore the statutory text added to Section 1101(a)(43) in 1990, but would also disregard the structure of the aggravated-felony definition. Section 1101(a)(43) encompasses more than 20 types of criminal conduct and directs that a conviction for any federal, state, or foreign offense "described in" those categories constitutes an aggravated felony. In none of those other categories does the statute make the inclusion of a state-law offense contingent on the crime's hypothetical treatment under federal law, even though federal law criminalizes some of the same conduct and coverage of those crimes (*i.e.*, prostitution, child pornography, fraud, sexual abuse, burglary, obstruction of justice) and the punishments imposed may vary significantly from State to State. Nor do petitioners cite anything in the text, structure, or legislative history of 8 U.S.C. 1101(a)(43)(B) in particular to suggest that Congress was uniquely distrustful of States' con-

trolled substance laws or particularly solicitous of aliens who violate the felony prohibitions in those laws.

C. The Plain Meaning of "Any Felony Punishable Under The Controlled Substances Act" In 18 U.S.C. 924(c)(2) Includes State-Law Convictions

1. Section 1101(a)(43) of Title 8 incorporates the definition of "drug trafficking crime" in 18 U.S.C. 924(c), and the ordinary meaning of Section 924(c)(2)'s text captures not only convictions for violating federal drug laws themselves, but also state-law felony convictions for conduct that would be "punishable" under those laws.

First, the plain meaning of "punishable under" the Controlled Substances Act is that the criminal *conduct* is susceptible to sanction under that federal law, not that a conviction for a federal crime was, in fact, obtained. The ordinary dictionary meaning of "punishable" is conduct that is "liable to" or "capable of being punished by law."[8] The courts of appeals likewise have uniformly held that Section 924(c) does not require a separate conviction of the predicate crime, but rather requires only that commission of the crime be proved in establishing

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[8] *Webster's Third New International Dictionary* 1843 (1986); see *Webster's New International Dictionary* 2013 (2d ed. 1950) (same); 12 *The Oxford English Dictionary* 845 (1989) (defining "punishable" as "[l]iable to punishment; capable of being punished"). This Court has recognized that same meaning as well. See *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 113 (1983); *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 488 (1985) (acts "punishable" under federal law "consist[] not of acts for which the defendant has been convicted, but of acts for which he could be").

the Section 924(c) violation.[9] If Congress had wanted to require a federal conviction, it would have said so.[10]

Indeed, when Congress wanted to focus specifically on federal law violations in Section 924, it did not speak of a crime "punishable under" federal law, but instead directly required "an offense under the Controlled Substances Act." 18 U.S.C. 924(e)(2)(A)(i). Only when it employed such restrictive language did Congress then find it necessary to identify separately the categories of "offense[s] under State law" that would qualify as well. 18 U.S.C. 924(e)(2)(A)(ii). Congress's contrasting selection of more inclusive language in Section 924(c)(2) thus underscores that the definition of "drug trafficking crime" is not limited to federal "offense[s] under the Controlled Substances Act," but encompasses any offense, state or federal, that could be punished—is "punishable"—under federal law, whether as a felony of a misdemeanor. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted).[11]

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[9] See, *e.g.*, *United States* v. *Anderson*, 39 F.3d 331, 355 (D.C. Cir. 1994) (collecting cases), vacated in part on reh'g en banc, 59 F.3d 1323 (D.C. Cir.), cert. denied, 516 U.S. 999 (1995); *United States* v. *Munoz-Fabela*, 896 F.2d 908, 911 (5th Cir.) ("[I]t is only the fact of the offense, and not a conviction, that is needed to establish the required predicate."), cert. denied, 498 U.S. 824 (1990).

[10] See, *e.g.*, 18 U.S.C. 2251(e) (Supp. III 2003) (requiring a "conviction under" designated federal laws); 8 U.S.C. 1357(d) (requiring a "violation of any law relating to controlled substances"); 12 U.S.C. 3420(b)(1)(A) (requiring a "violation of the Controlled Substance[s] Act [21 U.S.C.A. § 801 et seq.], [or] the Controlled Substances Import and Export Act [21 U.S.C.A. § 951 et seq.]"); 18 U.S.C. 1956(c)(7)(D) (Supp. III 2003) (requiring, *inter alia*, a "felony violation of * * * section 422 of the Controlled Substances Act"); 23 U.S.C. 159(a)(3)(A)(i)(I) ("any violation of the Controlled Substances Act").

[11] The Court has repeatedly invoked that principle of statutory construction

Second, Congress referred in Section 924(c)(2) to "any felony," and "any" is an all-encompassing word that reaches all members of a class regardless of individual variations. This Court has already held, with respect to Section 924(c) specifically, that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Had Congress wanted to require a federal felony, it knew how to say so. See 18 U.S.C. 521(c)(1) and (2) (defining covered offense as "a *Federal felony* involving a controlled substance" or "a *Federal felony* crime of violence") (emphases added). But here, unlike in Section 521, "[n]o modifier is present, and nothing suggests any restriction on the scope of" felonies described. *Lewis* v. *United States*, 445 U.S. 55, 60 (1980).

2. That plain text notwithstanding, petitioners devote substantial portions of their briefs to arguing (Lopez Br. 20-24; Toledo-Flores Br. 13-26) that the phrase "felony punishable under the Controlled Substances Act" means "federal crimes" (Lopez Br. 21; Toledo-Flores Br. 19) and "is limited to a federal drug crime" (Lopez Br. 22) and to "federal offenses" (Toledo-Flores Br. 25); see *id.* at 24.

Petitioners, however, could not mean what they say. That is because, for all their emphasis on Section 924(c)'s supposed federal aspect, petitioners have always agreed in this Court that some state-law controlled substance convictions qualify as convictions for "drug trafficking crime[s]," within the meaning of Section 924(c)(2), and therefore as aggravated felonies under 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004). See Lopez Br. 24-25, 28; Toledo-Flores Br. 6-7, 11-12. The questions presented and supporting arguments in their petitions for certio-

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to interpret Section 924. See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (interpreting Section 924(c)); *Custis* v. *United States*, 511 U.S. 485, 492 (1994) (18 U.S.C. 924(e)).

rari focus not on *whether* state-law offenses are drug-trafficking crimes, but on *which* state offenses qualify. 05-547 Pet. i, 7-18; 05-7664 Pet. i, 10-17. And the foundational premise of the hypothetical-federal-felony approach that petitioners endorse in their merits briefs is that a state-law controlled substance offense can be a "drug trafficking crime," and thus an "aggravated felony," as long as it would hypothetically be punished as a felony under federal law. See Lopez Br. 28; Toledo-Flores Br. 11-12.

In any event, petitioners' arguments are incorrect. Lopez argues (Br. 24-25) that a state-law offense qualifies as a "drug trafficking crime" only if the "government proves that the defendant in fact violated th[e] [Controlled Substances] Act," and suggests that the proof must be "beyond a reasonable doubt" (*ibid.* (citing *United States* v. *Hopkins*, 310 F.3d 145, 152 (4th Cir. 2002), cert. denied, 537 U.S. 1238 (2003)). But in civil immigration and federal sentencing proceedings, the government need only prove the fact of a conviction, and the INA provides that the conviction can be proved simply by producing proper documentation of the conviction. 8 U.S.C. 1229a(c)(3)(B). Neither a sentencing court nor immigration officials sit as a second criminal tribunal to retry the original offense or to reprove particular elements.[12] In addition, Lopez's argument overlooks that the operative provisions of both the INA and the Sentencing Guidelines require a "convic-

[12] In sentencing cases, proof is by a preponderance of the evidence. See *United States* v. *Watts*, 519 U.S. 148, 157 (1997); U.S.S.G. § 6A1.3, comment.; *cf. Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). In immigration cases, the burden of proof as to the fact of a "conviction" shifts depending on the context in which the question arises. The government must prove an alien is removable for conviction of an aggravated felony by clear and convincing evidence, 8 U.S.C. 1229a(c)(3)(A), but if the alien is seeking relief from removal, he must prove by a preponderance of the evidence the absence of such a conviction, 8 C.F.R. 1240.8(d). See generally 8 U.S.C. 1229a(c)(3)(B) (identifying what evidence constitutes "proof of a criminal conviction").

tion" of an "aggravated felony,"and thus an actual "conviction" of an actual, not hypothetical, "drug trafficking crime."[13] Whatever happens at an immigration or sentencing hearing, the fact remains that the only drug trafficking crimes of which petitioners were "convicted" were their state-law offenses, so only those state-law offenses can be the relevant "drug trafficking crime[s]."[14]

Alternatively, petitioners contend (Lopez Br. 21-22; Toledo-Flores Br. 19-22) that the language in Section 924(c)(1)(A) that creates a federal crime for using a firearm during and in relation to a drug trafficking crime or a crime of violence shows that a "drug trafficking crime" must be a federal offense. They emphasize the language requiring that the drug trafficking crime or crime of violence be one for which the person "may be prosecuted in a court of the United States." 18 U.S.C. 924(c)(1)(A). That language, however, does not advance petitioners' cause. The INA incorporates Section 924(c)'s "defin[ition]" of "drug trafficking crime," 8 U.S.C. 1101(a)(43)(B), and only Section 924(c)(2) *defines* "drug trafficking crime." Subsection (c)(1) creates a substantive federal

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[13] See U.S.S.G. § 2L1.2(b)(1)(C); 8 U.S.C. 1101(f)(8), 1158(b)(2)(B)(i), 1182(a)(9)(A)(i) and (ii), 1227(a)(2)(A)(iii), 1229b(a)(3) and (b)(1)(C), 1229c(b)(1)(B), 1231(b)(3)(B).

[14] The INA's definition of "conviction," 8 U.S.C. 1101(a)(48)(A), which triggers the immigration and sentencing consequences of an aggravated felony, itself makes the law of the convicting jurisdiction determinative. Section 1101(a)(48)(A) provides in full:

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

offense; it is not a definitional provision. Indeed, if Section 924(c)(2) had the federal-felony limitation that petitioners posit, there would have been no reason for Congress separately to require that the drug trafficking crime be subject to prosecution in federal court before it will support a 924(c)(1) federal prosecution.[15]

Finally, because petitioners agree that the definition of "drug trafficking crime" incorporated into the aggravated felony definition includes some state-law controlled substance offenses, their reliance (Toledo-Flores Br. 13-15; Lopez Br. 37) on the presumption against application of state law in federal statutes, *Jerome* v. *United States*, 318 U.S. 101, 104 (1943), is misplaced. Congress's express command in the INA that "State law" applies to the definition of "drug trafficking crime" as it is incorporated into the INA's aggravated felony provision, see 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence), conclusively dispels any such presumption. See *Jerome*, 318 U.S. at 104-106 (presumption can be overcome by the express reference to state law, legislative history, or

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[15] Moreover, while drug trafficking crimes are, by definition, already subject to prosecution in a court of the United States (because they must be punishable under federal law), the "may be prosecuted" language was necessary to confine the predicate "crime[s] of violence" for a Section 924(c)(1) prosecution to offenses that are punishable under federal law. See *Gonzales*, 520 U.S. at 5. That is because the statutory definition of "crime of violence"—unlike the neighboring definition of a "drug trafficking crime"—does not otherwise require that the qualifying conduct correspond to any federal criminal prohibition. See 18 U.S.C. 924(c)(3). Indeed, Congress enacted the "may be prosecuted" constraint in 1968, 18 years before it even added "drug trafficking crime" as a predicate offense under Section 924(c)(1), Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1224, and repeated it in 1984 when it first specifically included "crime[s] of violence" in that provision, which was two years before the inclusion of "drug trafficking crime," Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, § 1005(a), 98 Stat. 2138.

evidence that federal law would not be impaired if state law was included).[16]

D. A State-Law Felony Offense Is A Drug-Trafficking Crime Even If It is Not Hypothetically A Federal Felony

The question thus is not *whether* state-law offenses fall within the definition of "drug trafficking crime," but *which* ones. The text of Section 924(c)(2) answers that question. A state-law offense that (1) is a "felony," and (2) is "punishable under the Controlled Substances Act" or one of the other enumerated statutes, is a "drug trafficking crime." Nothing in that text, or the text that incorporates it into 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004), imposes as a third condition that the offense also be a hypothetical federal felony.

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[16] Likewise, because petitioners agree that the phrase "any felony punishable under the Controlled Substances Act" in Section 924(c)(2) includes some state-law convictions, their argument that Section 924(g)'s use of the same "punishable under" phraseology excludes state-law controlled substance offenses is unavailing. Lopez Br. 22; Toledo-Flores Br. 23-24. Section 924(g) reaches conduct "punishable" under the Controlled Substances Act and conduct that violates "any State law relating to any controlled substance." 18 U.S.C. 924(g)(2)-(3). By its plain terms, the latter subsection sweeps in state offenses that have no clear parallel prohibition (whether misdemeanor or felony) in the Controlled Substances Act, such as state laws proscribing the solicitation of controlled substances, loitering in circumstances that manifest an intent to commit a controlled substance offense, the intrastate transportation of drugs (including with a minor), causing death with a controlled substance, or the felony possession of drugs in specialized areas, such as schools, recreation centers, housing projects, abuse shelters, day care centers, or churches. See, *e.g.*, Ala. Code § 13A-12-202 (2005); Alaska Stat. § 11.71.040(a)(4) (LexisNexis Supp. 2005); Ark. Code Ann. § 5-64-411 (LexisNexis 2005); Cal. Penal Code § 653f(d) (West 1999); Cal. Health & Safety Code 11379, 11532 (West Supp. 2006); Conn. Gen. Stat. § 21a-279(d) (2003); Mo. Rev. Stat. § 195.025, 195.213 (2000); Nev. Rev. Stat. § 453.333 (2005).

1. The Phrase "Punishable Under the Controlled Substances Act" Substantively Describes the Qualifying Criminal Conduct

Consistent with the "aggravated felony" provision's focus on substantive categories of criminal conduct, Congress employed a definition of "drug trafficking crime" that comprises a number of criminal offenses by referring to all crimes that are punishable under the Controlled Substances Act and the other designated laws. For purposes of state-law convictions, the definition thus requires that state law proscribe a criminal act that is also prohibited by one of the federal laws. State-law controlled substance offenses that involve conduct that is not punishable under the Controlled Substances Act, see note 16, *supra*, do not qualify as "drug trafficking crime[s]" and on that ground alone are not aggravated felonies. In this case, there is no dispute that petitioners' cocaine possession offenses are punishable under the Controlled Substances Act. See 21 U.S.C. 844(a); 18 U.S.C. 2(a) ("Whoever * * * aids, abets, counsels, commands, induces or procures" the commission of an offense against the United States "is punishable as a principal").[17]

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[17] See also *Nye & Nissen* v. *United States*, 336 U.S. 613, 618 (1949) (it is "well engrained in the law" that one who aids or abets an offense "is as responsible for that act as if he committed it directly"). The Government recently filed a petition for a writ of certiorari seeking review of a Ninth Circuit decision limiting the application of the INA's aggravated felony definition as to aiding and abetting offenses. See *Gonzales* v. *Duenas-Alvarez*, No. 05-1629 (filed June 22, 2006). Lopez has never disputed that the aggravated felony definition encompasses aiding and abetting offenses or that aiding and abetting the possession of cocaine is conduct punishable under the Controlled Substances Act, and he did not seek this Court's review of those questions.

2. *"Felony" Means a Crime Punishable by the Convicting Jurisdiction by More than One Year in Prison*

a. *"Felony" Refers to the Length of the Authorized Sentence*

We agree with Lopez (Br. 25-27) that the term "felony" in Section 924(c)(2) takes its meaning from within the framework of Title 18, rather than from Title 21. To begin with, Section 924 is a provision of Title 18. Accordingly, its terms should be construed consistent with usage in that Title, unless Congress has directed otherwise, and Congress has not directed otherwise here. While Section 924(c)(2) defines the covered criminal conduct with express reference to the Controlled Substances Act in Title 21, Congress included no similar reference for the separate requirement that the crime be a "felony."

Title 18 contains no specific definition of "felony," but when a word is not defined by statute, courts "normally construe it in accord with its ordinary or natural meaning." *Smith* v. *United States*, 508 U.S. 223, 228 (1993). Longstanding usage of the term "felony" in Title 18 and throughout the United States Code focuses not on the label put on the crime, but on the "severity of the punishment" imposed by the convicting jurisdiction. *Jerome*, 318 U.S. at 108 n.6. Throughout Title 18, unless otherwise indicated, the term "felony" has been understood to refer to a crime punishable by death or imprisonment for more than one year. *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 272 n.2 (1942).[18] Indeed,

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[18] See *Robles-Rodriguez*, 281 F.3d at 904 ("Congress has a longstanding practice of equating the term 'felony' with offenses punishable by more than one year's imprisonment."); *United States* v. *Urias-Escobar*, 281 F.3d 165, 167-168 (5th Cir.) ("[F]ederal law traditionally defines a felony as a crime punishable by over one year's imprisonment."), cert. denied, 536 U.S. 913 (2002); *United States* v. *Graham*, 169 F.3d 787, 792 (3d Cir.) ("The one-year mark was used by Congress as early as 1865."), cert. denied, 528 U.S. 845

until 1984, Congress specifically defined "felony" in Title 18 as "[a]ny offense punishable by death or imprisonment for a term exceeding one year." 18 U.S.C. 1(1) (1982), repealed by Sentencing Reform Act of 1984, Pub. L. No. 98-473, Title II, Ch. II, § 218(a)(1), 98 Stat. 2027. In 1984, Congress replaced that provision with Section 3559, which, while lacking a specific definition, continued to classify all federal criminal offenses based on the length of the "maximum term of imprisonment authorized" and to make any offense for which the authorized penalty is more than one year of imprisonment a felony. 18 U.S.C. 3559(a); see U.S.S.G. § 2L1.2, comment. (n.2) (defining "felony" as "any federal, state, or local offense punishable by a term of imprisonment for a term exceeding one year").

That definition is repeated, either in terms or in substance, throughout the United States Code, including within 18 U.S.C. 924 and the Controlled Substances Act. Importantly, a number of those provisions refer to both state and federal convictions, which shows that the term "felony" does not, standing alone, necessarily connote a federal felony. See, *e.g.*, 18 U.S.C. 924(e)(2)(B); 21 U.S.C. 802(44).[19] The vast majority of States apply that same definition as well.[20] Cf. *Taylor* v. *United*

(1999); *United States* v. *Burston*, 159 F.3d 1328, 1335 n.13 (11th Cir. 1998) (the "traditional definition of a felony" is an offense "punishable by death or imprisonment in excess of one year"); *United States* v. *Page*, 84 F.3d 38, 41 (1st Cir. 1996) ("[F]elony had long been defined as 'any offense punishable by * * * imprisonment for a term exceeding one year.'") (citation omitted).

[19] See also 7 U.S.C. 2024(b)(1) and (c); 18 U.S.C. 751(a), 922(g)(1), 3156(a)(3), 3592(c)(2) and (10); 22 U.S.C. 2714(e)(3); 28 U.S.C. 540A(c)(1); 29 U.S.C. 186(d)(1) and (2); 49 U.S.C. 31301(9); 49 U.S.C. 44936(b)(1)(B)(xiv)(IX) (Supp. III 2003); Fed. R. Evid. 609(a) advisory committee's note.

[20] See Ala. Code § 13A-1-2(8) (2005); Alaska Stat. § 11.81.900(a)(24) (LexisNexis Supp. 2005); Ark. Code Ann. § 5-4-401 (LexisNexis 2006); Cal. Penal Code §§ 17, 19.2 (West 1999); Conn. Gen. Stat. § 53a-25 (2003); Del. Code Ann. title 11, §§ 233, 4205-4206 (2001 & Supp. 2004); Fla. Stat. § 775.08 (2001); Ga. Code Ann. § 16-1-3(5) (2003); Haw. Rev. Stat. § 701-107(2) (1993); Ind. Code

States, 495 U.S. 575, 598 (1990) (construing the term "burglary" in 18 U.S.C. 924(e)(2)(B)(ii) in accord with "the generic sense in which the term is now used in the criminal codes of most States").

Accordingly, in the absence of any contrary indication, the Court should give the term "felony" its "well-established meaning" in federal law. *Green Tree Fin. Corp.-Ala.* v. *Randolph*, 531 U.S. 79, 86 (2000). Furthermore, focusing the definition of "felony" on the maximum punishment authorized for an offense under the law of the convicting jurisdiction provides a level of uniformity to the definition of drug trafficking crime by making the applicability of a state-law conviction turn not upon varying nomenclature, see *Small* v. *United States*, 544 U.S. 385, 393 (2005), but upon an objective measure of the seriousness with which the convicting jurisdiction regards the offense.[21]

Ann. § 35-50-2-1 (LexisNexis 2004); Kan. Stat. Ann. §§ 21-3105, 21-4501 to 21-4502 (1995 & Supp. 2004); Mich. Comp. Laws Ann. § 761.1(g) (West 2000); Minn. Stat. Ann. § 609.02(2) (West Supp. 2006); Mo. Rev. Stat. § 556.016(2) (2000); Neb. Rev. Stat. §§ 28-105, 28-106 (Supp. 2004); N.H. Rev. Stat. Ann. § 625:9(III) (Supp. 2005); N.Y. Penal Law § 10.00(5) (2004); N.D. Cent. Code § 12.1-32-01 (1997); Ohio Rev. Code Ann. § 2901.02 (LexisNexis 2006); Okla. Stat. title 21, §§ 5-6, 10 (2001); Or. Rev. Stat. § 161.525 (2005); R.I. Gen. Laws § 11-1-2 (2002); S.D. Codified Laws § 22-1-4 (West Supp. 2006); *id.* § 22-6-2 (2004); Tex. Penal Code Ann. § 1.07(23) (West Supp. 2006); *id.* §§ 12.21-12.23 (2003); Utah Code Ann. §§ 76-3-102, 76-3-204 (2003); Va. Code Ann. §§ 18-2-8, 18-2-10 (LexisNexis 2004); Wash. Rev. Code Ann. § 9A.04.040(2) (West 2000); Wyo. Stat. Ann. § 6-10-101 (LexisNexis 2005). Four States define "felony" in terms of whether the offense is punishable by incarceration in a state prison or "at hard labor," which in practice appears to correspond with the traditional definition of a felony. See Idaho Code Ann. §§ 18-111 to 18-113 (2004 & Supp. 2005); La. Rev. Stat. Ann. § 14:2(4) (West Supp. 2006); Miss. Code. Ann. § 1-3-11 (West 1999); W. Va. Code Ann. § 61-11-1 (LexisNexis 2005).

[21] Section 802(13) of Title 21 defines "felony" as "any Federal or State offense classified by applicable Federal or State law as a felony." Some courts have applied that definition of "felony" in holding (at the government's behest)

b. "Felony" Status Depends on the Sentence Authorized by the Convicting Jurisdiction

Petitioners do not dispute (i) that the conduct of which they were convicted was "punishable under the Controlled Substances Act," or (ii) that whether an offense is a "felony" for these purposes turns upon the length of the authorized term of imprisonment. The problem for petitioners is that their state-law convictions—which were subject to terms of imprisonment exceeding one year and were for conduct punishable under the Controlled Substances Act—fall squarely within the plain meaning of Section 924(c)(2), as incorporated into 8 U.S.C. 1101(a)(43)(B). That reading, moreover, gives full effect to every word of the relevant statutory provisions, and leaves nothing else to interpret.

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that a State's designation of an offense as a "felony" is sufficient for purposes of Section 924(c). The Court need not resolve that issue in this case, however, because petitioners' offenses were both designated felonies under state law *and* punishable by more than one year in prison. See S.D. Codified Laws § 22-42-5 (Michie 1988); *id.* § 22-6-1(7) (1988 & Supp. 1997); Tex. Health & Safety Code Ann. § 481.102 (West Supp. 2006); *id.* § 481.115 (2003); Tex. Penal Code § 12.35 (West 2003). In any event, as petitioners note (Lopez Br. 26; Toledo-Flores Br. 26), Congress did not incorporate Title 21's definition of felony into 18 U.S.C. 924(c) (2000 & Supp. III 2003). Even if it had, that would not resolve the question of whether, for purposes of 21 U.S.C. 802(13), state or federal law is the "applicable" law in 18 U.S.C. 924(c)(2). Given that two States eschew the felony/misdemeanor distinction entirely, see N.J. Stat. Ann. § 2C:1-4 (2005); Me. Rev. Stat. Ann. title 17-A, § 1252 (2006), mere labels would not always suffice to categorize an offense as a drug trafficking crime. Moreover, reliance on the felony/misdemeanor label would be particularly unwieldy under the aggravated felony provision because that provision attaches consequences not only to state drug trafficking crimes, but also to foreign crimes. 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence). Cases relying upon foreign convictions as aggravated felonies have relied upon the length of the sentence to determine the crime's "felony" status. See, *e.g.*, *Ortiz* v. *INS*, 179 F.3d 1148, 1154-1156 (9th Cir. 1999); *United States* v. *Adkins*, 102 F.3d 111 (4th Cir. 1996), cert. denied, 522 U.S. 824 (1997).

In an effort to escape that conclusion, petitioners proffer a whole new definition of "felony" that has no basis in the law or precedent and is unworkable in practice. Petitioners argue (Lopez Br. 28; Toledo-Flores Br. 6-7, 12) that the "felony" requirement in Section 924(c) turns not on whether the offense is a "felony" in the convicting jurisdiction, but rather on whether it would be a felony if prosecuted in a different jurisdiction (*i.e.*, under federal law).[22] In other words, in petitioners' view, the felony status of the crime under state law is not enough. Federal law must second the State's judgment. There are four significant problems with that approach.

First, that is not how Congress wrote Section 924(c)(2). There is only one "felony" in the definition, and its only descriptor is the word "any," which is a term of expansion, not qualification. 18 U.S.C. 924(c)(2) ("any felony"). "Had Congress intended the narrow construction petitioner[s] urge[], it could have so indicated," *Smith*, 508 U.S. at 229, by simply defining "drug trafficking crime" as "any felony punishable *as such* under the Controlled Substances Act," or "any offense that is punishable *as a felony* under the Controlled Substances Act." See, *e.g.*, *United States* v. *Wilson*, 316 F.3d 506, 513 (4th Cir.), cert. denied, 538 U.S. 1025 (2003); *Gerbier*, 280 F.3d at 307; *United States* v. *Restrepo-Aguilar*, 74 F.3d 361, 364 (1st Cir. 1996). Congress, after all, knows how to write such words of limitation when it wants them. See 7 U.S.C. 12a(3)(H) (SEC may decline to register an individual who has been convicted of conduct "which would constitute a felony under Federal law if the offense had been committed under Federal jurisdiction"); 18 U.S.C. 521(c)(1) and (2) (requiring "a Federal felony involving a controlled substance" or "a Federal felony crime of

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[22] It is unclear whether petitioners, like amicus American Bar Association (Br. 8-13), would also require that the felony be punishable under state law by more than one year in prison, be classified as a "felony" by the State, or both. See *United States* v. *Amaya-Portillo*, 423 F.3d 427, 430-436 (4th Cir. 2005).

violence"). But Congress did not use such language here, and the Court should "decline to introduce that additional requirement on [its] own." *Smith*, 508 U.S. at 229 (declining to read into 18 U.S.C. 924(c)(1)'s prohibition against the "use" of a firearm the additional requirement that the firearm be used "as a weapon").

Second, petitioners' definition would require an unprecedented use of the term "felony," by requiring that an offense's qualifying status be determined by reference not to the jurisdiction of conviction, but to how another jurisdiction treats that offense. While federal law may establish the criterion for according a crime felony status—generally based on the term of imprisonment—satisfaction of that criterion is, in the absence of a contrary indication, assessed from the perspective of the convicting jurisdiction, not some other jurisdiction.[23] For example, 18 U.S.C. 16, which is also incorporated into the aggravated felony definition, 8 U.S.C. 1101(a)(43)(F), defines a "crime of violence" as, *inter alia*, a "felony" that entails a substantial risk of the use of force against a person or property. 18 U.S.C. 16(b). Courts have not limited state-law "crime[s] of violence" under that provision to those that would hypothetically be felonies under federal law.[24] Indeed, peti-

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[23] See, *e.g.*, 5 U.S.C. 7313(a); 5 U.S.C. 7371(a)(1); 5 U.S.C. 8148(b)(1); 7 U.S.C. 499d(d); 8 U.S.C. 1366(1) and (2); 21 U.S.C. 802(44); 21 U.S.C. 862a(a); 28 U.S.C. 540A(a); 29 U.S.C. 1111(a); 38 U.S.C. 5313(a)(1) and (b)(3); 38 U.S.C. 5313B(b)(1)(A) (Supp. III 2003); 42 U.S.C. 402(d)(7)(A); 42 U.S.C. 423(d)(6)(A) and (B); 42 U.S.C. 608(a)(9)(A)(i); 42 U.S.C. 1004(a)(2); 42 U.S.C. 1382(e)(1)(J)(4)(A); 42 U.S.C. 1437f(d)(1)(B)(v)(I); 42 U.S.C. 1437z(2)(A)(i).

[24] See, *e.g.*, *Leocal*, 543 U.S. at 7; *Francis* v. *Reno*, 269 F.3d 162, 169 (3d Cir. 2001) (felony status of crime in convicting jurisdiction, not its hypothetical felony status under federal law, is determinative); see also *United States* v. *Hernandez-Rodriguez*, 388 F.3d 779, 781 (10th Cir. 2004); *United States* v. *Campos-Fuerte*, 357 F.3d 956, 959 (9th Cir.), as amended, 366 F.3d 691 (9th Cir.), cert. denied, 543 U.S. 859 (2004); *Jobson* v. *Ashcroft*, 326 F.3d 367, 372 (2d Cir. 2003); cf. *United States* v. *Jackson*, 301 F.3d 59, 61 (2d Cir. 2002) (escape

tioners cite no decision from this Court, or from any court outside of the present context, that has ever held that whether an offense is a "felony" turns upon an analogous or hypothetical crime's status in a non-convicting jurisdiction.

Third, the question here is not the meaning of Section 924(c)(2) standing alone or in the abstract, but rather as incorporated *mutatis mutandis*—that is, with all necessary changes having been made—into 8 U.S.C. 1101(a)(43). See *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 16-17 (2000); *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 680 (1986). Because Section 1101(a)(43) expressly covers state offenses, it follows from the very nature of the incorporation that the inclusion of a state drug offense as an aggravated felony should turn on whether the state of conviction treats the offense as a felony, as gauged by the term of imprisonment authorized.[25]

Third, as the Board of Immigration Appeals recognized after attempting to administer the test, the hypothetical-

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is a "felony" crime of violence for purposes of Section 924(e)), cert. denied, 539 U.S. 952 (2003); *United States* v. *Woods*, 233 F.3d 482, 485 (7th Cir. 2000) (burglary of a commercial building is a violent "felony" under Section 924(e)).

[25] To the extent that the Title 21 definition of "felony" is thought relevant here, it also supports looking to the law of the convicting jurisdiction to determine whether a crime is classified as a "felony" under 18 U.S.C. 924(c)(2), as incorporated into 8 U.S.C. 1101(a)(43)(B). Under 21 U.S.C. 802(13), "[t]he term 'felony' means any Federal or State offense classified by applicable Federal or State law as a felony." Accord 21 U.S.C. 802(44) ("'felony drug offense' means an offense that is punishable by imprisonment for more than one year under any law of the United States *or* of a State *or* foreign country") (emphases added). Each of petitioners' offenses is a "felony" under the Controlled Substances Act's definitions, because each of their offenses was classified by applicable state law, both in name and by term of imprisonment, as a felony. See *Wilson*, 316 F.3d at 513 ("[W]hile the [Controlled Substances Act] would not *punish* Wilson's conduct as a felony, it does *define* it as a felony given the punishment it receives under Virginia law.").

federal-felony approach is unworkable. In *In re L-G-*, 21 I. & N. Dec. 89 (1995), withdrawn in part, *In re Yanez-Garcia*, 23 I. & N. Dec. 390 (B.I.A. 2002), the Board initially held that an alien's state-law felony possession of more than 400 grams of cocaine, which resulted in a 20-year sentence at hard labor, was not a drug trafficking crime because it was not "analogous to a *felony* under the federal statutes." *Id.* at 90, 92. After years of attempting to administer that approach, the Board abandoned it. *Yanez-Garcia*, 23 I. & N. Dec. at 390-391. The Board held that, in the absence of contrary circuit precedent, it would follow the approach of the majority of the circuits and hold that a state-law felony offense, such as for felony possession, is a drug trafficking crime without regard to how the offense might have been punished under federal law. *Id.* at 393-398.

The Board explained that the majority approach "bears considerable logical force and flows coherently and intuitively from the relevant statutory language." *Yanez-Garcia*, 23 I. & N. Dec. at 397. The Board stressed, moreover, that the hypothetical-federal-felony approach that petitioners advocate had proven to be inadministrable in practice. The Board repeatedly noted the "analytical difficulties inherent in the hypothetical felony approach" and "often-convoluted hypothetical analysis that can be difficult to apply in practice," *id.* at 393, 397-398.

> [W]hen determining whether a state drug conviction is analogous to a federal felony conviction, we are confronted with the fact that any hypothetical federal prosecution would have been governed by procedural and sentencing requirements entirely different from those that were, in fact, employed by the convicting state.

Id. at 392; see *id.* at 392, 396.[26]

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[26] While the Board is not entitled to deference in its construction of Section

Yanez-Garcia highlighted, as an example, the "analytical difficulties" that attend the treatment of recidivist drug possessions. Second or successive drug possession offenses are felonies under federal law, 21 U.S.C. 844(a), but may or may not be, in differing degrees and differing circumstances, under state law. Courts and the Board have wrestled with whether to condition the hypothetical federal felony determination on the fortuity of whether the state prosecutor complied with the type of notice and procedural constraints that are required by federal law. For example, the alien in *Yanez-Garcia* argued that his recidivist state-law felony possession offenses were not federal felonies, because federal law required that the first felony conviction be "final," and because he did not receive an "enhancement information" from a federal prosecutor, see 21 U.S.C. 851(a)(1). *Yanez-Garcia*, 23 I. & N. Dec. at 391-392.[27]

Furthermore, as noted earlier, some States have structured their controlled substance laws in ways that do not translate well into the federal system. Many State laws, including the South Dakota law under which Lopez was convicted, do not distinguish between cocaine and cocaine base,[28]

924(c)(2), a criminal statute that it has not been charged with administering, the Board's construction of 8 U.S.C. 1101(a)(43), and particularly its judgment, borne of hands-on experience, about the inadministrability of imposing the hypothetical-federal-felony approach on the INA's aggravated felony provision, merit deference. See *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 322 (1988) (Scalia, J., concurring in part and dissenting in part) ("[O]ne of the most important reasons we defer to an agency's construction of a statute [is] its expert knowledge of the interpretations' practical consequences."); see generally *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999).

[27] See also *Vacchio* v. *Ashcroft*, 404 F.3d 663, 675 (2d Cir. 2005) (prior conviction established a hypothetical federal felony); *Steele* v. *Blackman*, 236 F.3d 130, 137-138 (3d Cir. 2001) (strictly limiting use of prior convictions); cf. *Price* v. *United States*, 537 U.S. 1152 (2003).

[28] See, *e.g.*, S.D. Codified Laws §§ 34-20B-1(13), 34-20B-16(2) (West 2004); Ark. Code § 5-64-101(18)(B) (LexisNexis 2005); Idaho Code §§ 37-2701(t)(4), 37-

while federal law makes simple possession of specified amounts of cocaine base a felony, 21 U.S.C. 844(a). In addition, a prosecution under federal law based on the possession of more than a personal-use amount of drugs would ordinarily be for possession with intent to distribute, which is a felony, see 21 U.S.C. 841(a). But a number of States take a different approach, providing a graduated scheme of "possession" offenses that assigns felony treatment, with a potentially severe sentence, when the amount possessed is commensurate with a trafficking crime, while not specifically requiring proof of an intent to distribute. See *State* v. *Williams*, 471 So.2d 255, 258-259 (La. Ct. App. 1985) (defendant convicted of possessing 10,000 pounds of marijuana), writ denied, 475 So.2d 1102 (1985); *L-G-*, 21 I. & N. Dec. at 90 (alien convicted of "possession" of in excess of 400 grams of cocaine and sentenced to "20 years at hard labor").[29] There is no sound reason to withhold

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2707(a) and (b)(4) (2002); Kan. Stat. Ann. §§ 65-4107(a) and (b), 65-4127e(a) and (b) (1992); Miss. Code §§ 41-29-105(s)(4), 41-29-115(A)(a)(4) (Supp. 2005).

[29] See also *State* v. *Basurto*, 501 P.2d 970, 972 (Az. Ct. App. 1972) (noting foreign conviction for possession of three tons of marijuana); U.S. Br. at 3, 5, 10, *Salazar-Regino* v. *Moore*, No. 05-830 (filed Apr. 5, 2006) (one petitioner convicted of possessing between 50 and 2000 pounds of marijuana, which was punishable by 2 to 20 years in prison; second petitioner convicted of possessing between 5 and 50 pounds of marijuana, which was punishable by 2 to 10 years in prison); U.S. Br. at 4, 7, *Galindo-Pena* v. *Gonzales*, No. 05-1276 (filed July 7, 2006) (petitioner convicted of possessing 50 to 2000 pounds of marijuana and sentenced to eight years in prison); *In re Castillo-Zapata (alias Maria de Jesus Ramo)*, No. A37 837 447, at 2 (Immig. Ct. June 4, 2003); U.S. Br. in Opp. at 6, *Hernandez-Macias*, No. 05-11277 (filed Aug. 2, 2006) (petitioner convicted of possessing 50 to 2000 pounds of marijuana); *Gerbier*, 280 F.3d at 300-301, 313-314 (under Delaware law, possession of between 5 and 50 grams of cocaine is punished as "trafficking in cocaine"); Del. Code Ann. title 16, § 4753A(a) and (e) (2003 & Supp. 2004) (defining sale and distribution solely in terms of possession in excess of a designated weight); Ohio Rev. Code Ann. § 2925.11(C) (LexisNexis 2006) (criminalizing as "possession" the possession of "bulk amounts" of drugs "that are normally possessed by a drug seller, pusher or

the aggravated-felony designation from such crimes on the ground that the "possession" label attached by state law would, if transferred mechanically into the federal system, be only a misdemeanor offense of "simple possession." Petitioners, for all their concern with uniformity in the treatment of aliens, offer no explanation for why Congress would have wanted the aggravated-felony designation to turn upon either an unrealistic conception of how federal law operates in practice or the happenstance of how States formulate their controlled substance offenses, rather than the punishment they attach.[30]

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dealer," *State* v. *Goodnight*, 370 N.E.2d 486 (Ohio Ct. App. 1977)); Alaska Stat. § 11.71.040(a)(3)(G) and (d) (LexisNexis 2004) (felony possession of 25 or more marijuana plants); La. Rev. Stat. Ann. § 40:966(F) (West Supp. 2006) (felony possession of more than 60 pounds of marijuana); Me. Rev. Stat. Ann. title 17-A, §§ 1107-A(1)(A)-(B), 1252 (2006) (possession of more than 14 grams of cocaine punishable as a felony); Miss. Code Ann. § 41-29-139(c)(2)(D)-(G) (Supp. 2005) (felony possession of more than 250 grams of marijuana); Tex. Health & Safety Code Ann. § 481.121(a)(5) (West 2003) (felony possession of between 50 and 2000 pounds of marijuana); Tex. Health & Safety Code Ann. § 481.121(b) (West 2003) (graduated offenses for possession include life imprisonment for more than 2000 pounds of marijuana); Wash. Rev. Code Ann. §§ 69.50.4013, 69.50.4014 (Supp. 2006) (felony possession of more than 40 grams of marijuana).

[30] Lopez argues (Br. 28-29) that his unusual construction of "felony" must be adopted to prevent tension between the aggravated-felony removal provision, 8 U.S.C. 1227(a)(2)(A)(iii), and the INA provision excluding the first-time possession of 30 grams or less of marijuana for personal use from the "controlled substances" convictions that provide a separate basis for removal. See 8 U.S.C. 1227(a)(2)(B)(i). Whatever the traction of such an argument in theory, it has little basis in reality (a fact of which Congress presumably was aware). Thirty grams is approximately one ounce of marijuana, and only one State punishes the possession of less than one ounce of marijuana for personal use as a felony. See Fla. Stat. § 893.13(6)(a) and (b) (2001) (punishing possession of over 20 grams of marijuana as a felony). Lopez cites no case that has ever both fallen within that 10 gram gap and led to removal on aggravated felony grounds. While a handful of States draw the felony line at one ounce (more precisely, 28.3 grams), see Nev. Rev. Stat. §§ 453.336(4), 453.3395(1)

E. The Incorporation Of "Drug Trafficking Crime" Into 8 U.S.C. 1101(a)(43)(B) Ensures That Certain Possession Offenses Can Be "Aggravated Felonies"

Although Congress could have limited the drug offenses included as aggravated felonies to "illicit trafficking in a controlled substance," 8 U.S.C. 1101(a)(43)(B), Congress deliberately went further. Congress added that the qualifying offenses "includ[e] a drug trafficking crime (as defined in section 924(c) of Title 18)." In so doing, Congress sought to ensure that the category of controlled substance offenses that can trigger an aggravated felony designation would include certain types of offenses less commonly associated with "trafficking," such as the enumerated statutes' prohibitions on drug possession, see 21 U.S.C. 844(a), 955, and other similar offenses, see also 21 U.S.C. 843(a)(5) and (6) (possession of certain types of equipment). "In definiti[onal] provisions of statutes * * *, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration." *American Surety Co.* v. *Marotta*, 287 U.S. 513, 517 (1933). That is how Congress used "include" in other parts of the aggravated felony definition. See 8 U.S.C. 1101(a)(43)(G) ("theft offense" defined as "including receipt of stolen property"); 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (final sen-

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(1995); N.D. Cent. Code § 19.03-1-23(6) (Supp. 2005); Or. Rev. Stat. § 475.864(2) and (3) (2005), the government is aware of no removal case falling within the exceedingly marginal gap between 28.3 and 30 grams either. In any event, the remote prospect of such a case ever arising provides no basis for concluding that the term "felony" is used here in the novel manner that petitioners propose. It suggests at most that, in some hypothesized case in the future, a court might have to resolve whether the later enacted and specific personal-use exception, Immigration Act of 1990, Pub. L. No. 101-649, § 602(a), 104 Stat. 5077, overrides the general language of the aggravated felony provision. See *Varity Corp.* v. *Howe*, 516 U.S. 489, 511 (1996) ("[T]he specific governs over the general.").

tence) (defining "provision of law" as "including any effective date"). That is also how the term is employed throughout the INA's other definitional provisions. See 8 U.S.C. 1101(a)(14), (17), (28), and (36).

Indeed, having just defined "aggravated felony" in the preceding clause in 8 U.S.C. 1101(a)(43)(B) to mean, *inter alia*, "illicit trafficking in a controlled substance," the only evident function of the "including" clause is to ensure that the type of offense conduct covered would include offenses that are less commonly characterized as illicit trafficking, like possession. To hold otherwise, as amicus NYSDA argues (Br. 6-28), and read the entire "drug trafficking crime" clause as encompassing nothing more than offenses that are already a "subset" (*id.* at 6) of "illicit trafficking" would leave that entire clause "with no job to do." *Doe* v. *Chao*, 540 U.S. 614, 623 (2004). Congress, however, is not in the habit of drafting entire definitional clauses that "accomplish[] nothing," *ibid.*, and it is a "cardinal principle of statutory construction" that the Court must "give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section," *Bennett* v. *Spear*, 520 U.S. 154, 173 (1997) (internal quotation marks omitted).

Nor is there anything incongruous about Congress's inclusion of possession offenses in a provision addressed to drug trafficking. First, in the same statute passed in 1988, Congress enacted both the broad definition of "drug trafficking crime" in Title 18 and the "aggravated felony" provision in the INA, and it deliberately linked the two by providing that "any drug trafficking crime as defined in section 924(c)(2) of title 18" constitutes an aggravated felony. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 6212, 7342, 102 Stat. 4360, 4469. The title of that law, moreover, was not the Anti-Drug Trafficking Act, but the "Anti-Drug Abuse Act," an express purpose of which was "[t]o prevent the * * * use of illegal drugs." Preamble, 102 Stat. 4181.

Second, Congress has long recognized that illegal drug possession offenses "have a substantial and detrimental effect on the health and general welfare of the American people," and that individual acts of possession "have a substantial and direct effect" on illicit drug trafficking and "contribute to swelling the interstate traffic in such substances." 21 U.S.C. 801(2), (3) and (4); see *Gonzales* v. *Raich*, 125 S. Ct. 2195, 2209 (2005) (failure to regulate individual cultivation or use of controlled substances "would leave a gaping hole in the [Controlled Substances Act]"). Indeed, the cocaine that each petitioner possessed (or aided another in possessing) was itself the product of a chain of drug trafficking and sales.

"Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances." *Harmelin* v. *Michigan*, 501 U.S. 957, 1003 (1991) (Kennedy, J., concurring in part) (citation omitted). Indeed, because "drug abuse is one of the most serious problems confronting our society today," *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 674 (1989), there is no logical reason that Congress—having made offenses like failure to appear, obstruction of justice, and mutilating a passport "aggravated felonies," 8 U.S.C. 1101(a)(43) (P), (Q), (S) and (T)—would want to be particularly solicitous of aliens who fuel "the drug epidemic in this country," *Harmelin*, 501 U.S. at 1003 (Kennedy, J., concurring in part). See *Barrett*, 20 I. & N. Dec. at 175 (in 19 U.S.C. 924(c)(2), "Congress has sent out a clear message that narcotics offenses are to be dealt with harshly.") (citation omitted).

Third, petitioners' assumption that there is some clear divide between drug possession offenses and drug trafficking overlooks that, as explained above, States have adopted a variety of strategies within their criminal codes to combat drug abuse. Federal law and prosecutorial practice generally police

trafficking offenses by charging possession of more than a personal-use amount of a drug as possession with intent to distribute, which is a federal felony, see 21 U.S.C. 841(a) and (b)(1) (2000 & Supp. III 2003).[31]

A number of States, however, take a different tack and establish a graduated system of penalties for possession, under which possession of trafficking-level amounts of a controlled substance are subject to the same type of severe penalties as federal trafficking offenses, even though the offense of conviction remains denominated "possession." Indeed, the individual whom amicus Asian American Justice Center describes (Br. 15) as a "positive contributor[] to American society" and unjustly labeled as a "traffick[er]" was convicted in Texas of possessing between 50 and 200 pounds of marijuana. *In re Castillo-Zapata (alias Maria de Jesus Ramo)*, No. A37 837 447, at 2 (Immig. Ct. June 4, 2003); see note 29, *supra*; cf. *Raich*, 125 S. Ct. at 2214 nn. 41 & 42.

A state-law conviction for "possession" of a controlled substance thus does not have the singular, non-trafficking connotation that petitioners' arguments assume (Lopez Br. 18-20; Toledo-Flores Br. 15-18). Accordingly, Congress sensibly included within the category of drug-related "aggravated felonies" those possession offenses that are sufficiently serious to be punished by the State of conviction as a felony.

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[31] See, *e.g.*, *United States* v. *Haskins*, 166 Fed. Appx. 76 (4th Cir. 2006) (per curiam) (charging possession with intent to distribute 310.6 grams—approximately 11 ounces—of marijuana); *United States* v. *Rangel*, 149 Fed. Appx. 254, 255 (5th Cir. 2005) (per curiam) (charging possession with intent to distribute 771 grams—approximately 1.75 pounds—of marijuana); see generally 28 C.F.R. 76.2 (defining "personal use amounts" of various controlled substances).

F. The Legislative History Does Not Support Petitioners

Petitioners argue (Lopez Br. 29-33; Toledo-Flores Br. 29-37) that the legislative history supports their proposed hypothetical-federal-felony approach. As an initial matter, because the meaning of "felony" is plain, the meaning of "punishable under the Controlled Substances Act" is plain, and the inclusion of state-law offenses is plain, this Court need not "not resort to legislative history" in an effort "to cloud a statutory text that is clear." *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994); see *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 126 S. Ct. 2455, 2459 (2006).

Beyond that, what is notably missing from petitioners' legislative-history argument is *any* specific discussion of the issue presented here. Whatever the legitimacy of relying on legislative history that actually discusses the statutory construction question before the Court, inferences distilled from isolated statements addressed to other legislative concerns provide no basis for narrowing or disregarding straightforward statutory text.

In any event, even the materials that petitioners cite fail to support their position. First, petitioners argue (Lopez Br. 30-31; Toledo-Flores Br. 30-32) that Congress's enactment in 1988 of the current definition of "drug trafficking crime," see Anti-Drug Abuse Act, § 6212, 102 Stat. 4360, was a "clarification" of prior text that encompassed "any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substance," 18 U.S.C. 924(c)(2) (Supp. V 1987). But that contention begs the question of how much clarifying Congress did. Statutory "clarifications" sometimes effect "significant change" in the law. *United States* v. *California*, 381 U.S. 139, 155 (1965); see *id.* at 197 (Black, J., dissenting); see also *Commissioner* v. *Bilder*, 369 U.S. 499, 503-504 (1962).

Lopez argues (Br. 31) that the amended text made clear that possession with intent to distribute was covered. It certainly did. But the text does not stop there. As incorporated into 8 U.S.C. 1101(a)(43), the new definition also reaches—by petitioners' own admission (Lopez Br. 28; Toledo-Flores Br. 11-12)—some state-law offenses. In addition, the new language captures, under petitioners' own reading, some possession felonies, because the Controlled Substances Act and the Controlled Substances Import and Export Act punish certain possession offenses as felonies. See 21 U.S.C. 844(a), 955. As to which state-law offenses and which possession offenses are covered, the legislative record in 1988 says no more. The closest it comes is Senator Biden's statement that "[t]he amendment makes clear that section[] 924(c) * * * cover[s] *all* drug felonies." 134 Cong. Rec. 32,695 (1988). But that statement hurts, rather than helps, petitioners.

Second, petitioners attempt (Lopez Br. 31-33; Toledo-Flores Br. 32-37) to derive support for their position from the history of the 1990 amendment to the INA that directed that "aggravated felony" encompasses any offense "described in" Section 1101(a)(43), "whether in violation of Federal or State law" or foreign law. But there is nothing there to help petitioners. Both petitioners agree (Lopez Br. 32; Toledo-Flores Br. 34-35) that Congress intended to codify the Board's decision in *Barrett*, which had held that state-law offenses are "drug trafficking crime[s]" within the meaning of Section 924(c)(2). See 20 I. & N. Dec. at 175 ("[I]t is unreasonable to assume that Congress * * * sought to differentiate between aliens convicted of similar drug-related offenses on the basis of whether the conviction was accomplished under state or federal law."). The Board also held that the state crime must be "sufficiently analogous" to a federal felony. *Ibid.* But the Board did not then "speak to the question whether, for purposes of determining if a state drug conviction constituted a

'drug trafficking crime,' it mattered whether the state conviction was a misdemeanor or a felony." *Gerbier*, 280 F.3d at 304. And, as Toledo-Flores acknowledges (Br. 35), nothing in the legislative history speaks to or even refers to the aspect of the Board's holding that required a "sufficiently analogous" federal felony. Indeed, nothing suggests that Congress had in mind any limitation at all on the types of state-law offenses encompassed within the aggravated felony provision, other than the textual directive that they be "described in" Section 1101(a)(43).[32]

Third, various indicia in the legislative history confirm the plain language reading of both the INA and Section 924(c)(2). "Trafficking" in its narrow sense was not Congress's only concern; Congress took aim at use and possession. The 1988 law included reducing the "use" of illegal drugs among its avowed purposes. See Anti-Drug Abuse Act, Pub. L. No. 100-690, 102 Stat. 4181 (preamble). The need to eradicate the demand for illegal drugs, and not just the supply, was frequently discussed in the legislative history, along with the enormous strain that incarcerating aliens for controlled substance offenses was putting on the States' criminal justice systems.[33] Thus, to the

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[32] Lopez argues (Br. 33) that, if state "drug trafficking crimes" fall within Section 924(c)(2), then there was no need for Congress to also cover "illicit trafficking" offenses. That is incorrect. The inclusion of "illicit trafficking" sweeps in all trafficking offenses, without the requirement that they be either felonies or conduct punishable under the Controlled Substances Act or the other designated federal laws. The added language thus captures, for example, trafficking offenses under other federal criminal laws, *e.g.*, 18 U.S.C. 2118 (robberies and burglaries involving controlled substances); 21 U.S.C. 1901 *et seq.* (Foreign Narcotics Kingpin Designation Act), and state misdemeanor trafficking offenses and felonies not covered by the Controlled Substances Act, see, *e.g.*, Haw. Rev. Stat. § 712-1248 (1993) (misdemeanor distribution of marijuana); note 16, *supra*.

[33] See 134 Cong. Rec. at 32,633-32,634 (Sen. Dole) ("[W]e will focus attention back on the crime—in most cases the felony—of possession of illicit drugs.");

extent the legislative history is relevant, it counsels against petitioners' proposed categorical exception for state possession offenses—especially the possession of drugs in quantities that are strongly indicative of trafficking and are accordingly regarded by the prosecuting jurisdiction as deserving of treatment as felonies.

G. Including State Felonies Is Consistent With Both Principles Of Uniformity And The Rule Of Lenity

1. As explained, the relevant statutory provisions, by their terms, include state-law drug felonies as aggravated felonies, without requiring a hypothetical-federal-felony counterpart. The courts of appeals that have addressed the question in the criminal sentencing context have uniformly agreed that the plain language covers state felony drug offenses,[34] with the

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id. at 32,636 (Sen. Chiles) ("[W]e cannot win the drug war if we do not reduce the demand for drugs."); *id.* at 32,652 (Sen. Helms) (failure to punish "[p]ossession alone" had been "a giant loophole" in the law); H.R. Rep. No. 681, *supra*, Pt. I, at 146-147 (noting, immediately before discussing *Barrett*, the large percentage of drug-related offenses committed by illegal aliens, both misdemeanors and felonies); *Criminal Aliens: Hearing on H.R. 3333 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 95 (1989) (Judge David Carter) ("The 'drug war' has focused on the federal level and failed to recognize that most offenders are under state jurisdiction."); *Illegal Alien Felons: A Federal Responsibility: Hearing Before the Subcomm. on Federal Spending, Budget & Accounting of the Senate Comm. on Governmental Affairs*, 100th Cong., 1st Sess. 1, 4, 5, 19, 21-22, 33, 51-52, 58, 97-98, 133 (1987); *id.* at 10 ("[T]he number of aliens involved in criminal activities, particularly drugs is increasing every day" and "creating a burden on an already overcrowded jail.").

[34] See *Restrepo-Aguilar*, 74 F.3d at 364-366 ("The statutory definition plainly does not require that an offense, in order to be a drug trafficking crime, be subject to a particular magnitude of punishment if prosecuted under the [Controlled Substances Act]."); *United States* v. *Rodriguez*, 26 F.3d 4, 7 (1st Cir. 1994) (relying on natural meaning of text because "[w]e are not at liberty * * * to rewrite the statutory scheme"); *United States* v. *Pornes-Garcia*, 171 F.3d 142, 145-147 (2d Cir.) (relying on statutory text), cert. denied, 528 U.S. 880

sole exception of a decision last year by the Sixth Circuit.[35] The Fifth and Eighth Circuits, and initially the Second Circuit, have found the language equally straightforward when applying it in immigration cases.[36] The Second, Third, Seventh, and Ninth Circuits have held to the contrary in immigration cases only, but in so doing they have relied upon a judicially inferred policy in favor of uniformity.[37] Indeed, in sentencing cases

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(1999); *Wilson*, 316 F.3d at 513 (the court "need look no further than the text of section 924(c)(2) to refute Wilson's argument"; "[T]here is no suggestion from the text of the statute itself that only those offenses that federal law punishes as felonies are eligible."); *United States* v. *Hinojosa-Lopez*, 130 F.3d 691, 694 (5th Cir. 1997) (relying on statutory text); *United States* v. *Briones-Mata*, 116 F.3d 308, 309-310 (8th Cir. 1997) (per curiam) (contrary reading of text is "without merit"); *United States* v. *Ibarra-Galindo*, 206 F.3d 1337, 1340 (9th Cir. 2000) (relying on "the plain meaning of the text"), cert. denied, 531 U.S. 1102 (2001); *United States* v. *Cabrera-Sosa*, 81 F.3d 998, 1000 (10th Cir.) (reliance on plain text), cert. denied, 519 U.S. 885 (1996); *United States* v. *Simon*, 168 F.3d 1271, 1272 (11th Cir.) (relying on the "plain language of the [Controlled Substances Act]"), cert. denied, 528 U.S. 844 (1999).

[35] See *United States* v. *Palacios-Suarez*, 418 F.3d 692, 699-700 (6th Cir. 2005) (relying on legislative history to require a hypothetical federal felony).

[36] See *Jenkins* v. *INS*, 32 F.3d 11, 14 (2d Cir. 1994) ("plain language" is "unequivocal[]"); *United States* v. *Hernandez-Avalos*, 251 F.3d 505, 510 (5th Cir.) ("[T]he statutory language is clear."), cert. denied, 534 U.S. 935 (2001); 05-547 Pet. App. 4a (relying on "plain language" of the statute to adopt the same position in the immigration context as previously endorsed in the sentencing context); see also *Gerbier*, 280 F.3d at 318 (Reavley, J., dissenting) ("The words themselves seem to me to point to any state felony that would be conduct punishable under federal law.").

[37] See *Aguirre* v. *INS*, 79 F.3d 315, 317 (2d Cir. 1996) (relying on the perceived "interests of nationwide uniformity" in immigration law and avoiding "disparate treatment" of aliens); *Gerbier*, 280 F.3d at 310-311 (3d Cir.) (relying on "the legislative history of § 924(c)(2) and the need for uniformity in the immigration context"); *Gonzales-Gomez* v. *Achim*, 441 F.3d 532, 535-536 (7th Cir. 2006) (expressing concerns about allowing state law "to determine matters that are at the heart of the federal immigration laws," and the perceived need to avoid "disuniformity" in immigration law); *Cazarez-Gutierrez* v. *Ashcroft*,

where that perceived policy does not apply, both the Second and Ninth Circuits continue to apply the plain reading of the exact same statutory language and hold that state-law drug felonies *are* aggravated felonies, whether or not the conduct would be punishable as a felony under federal law.[38] That pattern of judicial decisionmaking underscores that petitioners' hypothetical-federal-felony approach is not the product of statutory ambiguity, but of a policy argument in search of a textual home.

Moreover, the reliance of some courts, echoed by petitioners here (Lopez Br. 33-37; Toledo-Flores Br. 39-43), on a policy they perceive in favor of uniformity in immigration law is misplaced. First, such general notions cannot trump unambiguous text, like "any felony" in 18 U.S.C. 924(c)(2), and the INA's express inclusion of any offense "described in" the aggravated felony provision regardless of "whether in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004) (penultimate sentence).

Second, the dispute here is not between uniformity and disuniformity. It is a dispute about different baselines for uniformity. The government's position, in accord with the statutory text, ensures uniformity in that only drug trafficking crimes that are both "felon[ies]"—offenses subject to a term of more than one year in prison—in the charging jurisdiction

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382 F.3d 905, 910-918 (9th Cir. 2004) (relying exclusively on interests in "national uniformity" and avoiding "inequitable consequences," and a finding that there was "nothing in the legislative history to rebut the presumption that Congress intended uniform application of the immigration laws").

[38] See *United States* v. *Pornes-Garcia*, 171 F.3d 142, 145-147 (2d Cir.), cert. denied, 528 U.S. 880 (1999); *Cazarez-Gutierrez*, 382 F.3d at 911; *Robles-Rodriguez*, 281 F.3d at 904-905; see also *Yanez-Garcia*, 23 I. & N. Dec. at 395 ("[T]he Second Circuit made clear in *Aguirre* [that] it adopted the Board's approach out of a desire for a uniform national rule, and not necessarily because it agreed with our interpretation of 18 U.S.C. 924(c)(2).").

and involve conduct that is "punishable under" the specified federal drug laws will trigger "aggravated felony" status.

Petitioners, by contrast, want to draw the line at requiring a conviction for conduct that would amount to a federal felony even if charged in a jurisdiction with materially different drug laws. However, petitioners' approach leads to substantial disuniformity and divergent outcomes for aliens who have engaged in the same conduct—such as the possession of 2000 pounds of marijuana—based on whether the defendant is charged in federal or state court, how States happen to structure their controlled substance laws, the extent to which state laws coincide with the design of federal law, and the amount of information recorded in a plea or conviction records, such as the amount and type of drugs involved. See, *e.g.*, 05-547 Gov't Pet. Stage Br. 4 n.3 (whether Lopez's conviction was for a federal felony turns upon information lacking from the record, such as the amount of cocaine and whether it was cocaine or cocaine base); see generally *Shepard* v. *United States*, 544 U.S. 13 (2005). A defendant arrested with such a significant quantity of drugs would normally be prosecuted in the federal system as a felon for possession with intent to distribute. See 21 U.S.C. 841(a). Many state statutes provide an analogous felony. But other States have chosen another option—denominating the crime possession, but punishing the possession of large amounts with significant prison time. As the text and structure of 8 U.S.C. 1101(a)(43)'s definition of "aggravated felony" attests, Congress was aware both that States are the primary enforcers of the criminal law within our federalist system, and that States formulate their criminal prohibitions in varied ways and in response to state-based interests and concerns. Against that backdrop, there is no sound reason that Congress would have wanted the felony classification of the same illicit drug activity to vary based on

the presence or absence of a directly and technically analogous federal felony.

Petitioners also argue (Lopez Br. 35; Toledo-Flores Br. 42-43) that failure to adopt the hypothetical-federal-felony approach would call into doubt the constitutionality of the statute. That argument is without merit. The Constitution empowers Congress "[t]o establish an uniform Rule of Naturalization," U.S. Const. Art. I, § 8, Cl. 4—*i.e.*, to enact a single set of standards to determine who may become a *citizen* of this Nation and of its several States. See *The Federalist* No. 42, at 269-271 (James Madison) (Clinton Rossiter ed. 1961). This case, however, involves the removal of aliens who commit crimes, not standards for citizenship.

Moreover, even if the Uniformity Clause applied to Congress's regulation of criminal aliens, it would not dictate that Congress address that problem without heed to state law, which, after all, is the primary source of criminal prohibitions. Quite the opposite, the Uniformity Clause "is not a straightjacket that forbids Congress to distinguish among classes," or to "recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States." *Railway Labor Executive's Ass'n* v. *Gibbons*, 455 U.S. 457, 469 (1982) (applying the bankruptcy portion of the Uniformity Clause) (citation omitted).[39]

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[39] See *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 873 (1995) (Thomas, J., dissenting) ("Even after Congress chose to exercise its power to prescribe a uniform route to naturalization, the durational element of the citizenship requirement in the Qualifications Clauses ensured that variances in state law would continue to matter."); *Toll* v. *Moreno*, 458 U.S. 1, 13 n.18 (1982) (state law can affect the employment of aliens "to the extent consistent with federal law") (citation omitted); see also *Holmes* v. *Jennison*, 39 U.S. (14 Pet.) 540, 594 (1840) (opinion of Barbour, J.) ("The power of establishing a system of naturalization, and bankrupt laws, is contained in the same clause, and expressed, identically, in the same terms.").

2. Contrary to petitioners' arguments (Lopez Br. 37-38; Toledo-Flores Br. 38-39), the rule of lenity is not applicable here. First, that rule requires a "grievous ambiguity" in statutory text such that, "after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted and punctuation altered). There is no such grievous ambiguity here. Petitioners do not dispute that the plain language of the relevant texts includes state felony convictions. Lopez Br. 28; Toledo-Flores Br. 11-12; 8 U.S.C. 1101(a)(43)(penultimate sentence). While petitioners, their amici, and some courts have identified policy reasons for favoring narrower coverage of state-law offenses, those arguments have no anchor in statutory text. The rule of lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961).

Second, even if applicable, the rule of lenity would not point in any particular direction in this case. While petitioners' hypothetical-federal-felony approach would benefit them, it would harm other aliens who, for example, were convicted of an offense that is a misdemeanor under state law, but a felony under federal law, either in its own right or due to a recidivist provision.[40]

Perhaps a court could devise a position that would require every possible distinguishing factor to be resolved in favor of a criminal alien. But there is no textual basis for layering multiple conditions and qualifications on a statute that applies to "any felony," "whether in violation of Federal or State law."

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[40] See *Yanez-Garcia*, 23 I. & N. Dec. at 392 n.3 ("[T]he hypothetical approach * * * could, under certain circumstances, result in unduly harsh consequences for persons convicted of misdemeanors under state law."); *United States* v. *Simpson*, 319 F.3d 81, 85-86 (2d Cir. 2002); *Gerbier*, 280 F.3d at 311 n.12.

See *Smith*, 508 U.S. at 239 ("The mere possibility of articulating a narrower construction * * * does not by itself make the rule of lenity applicable."). The rule of lenity has never been held to require the type of heads-the-alien-wins; tails-the-government-loses approach to statutory construction that petitioners and their amici advocate. Rather, the principle comes into play, if at all, only "at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 410 (1991) (citation omitted).

CONCLUSION

The petition for a writ of certiorari in No. 05-7664 should be dismissed as moot. The judgment of the court of appeals in No. 05-547 should be affirmed. Alternatively, the judgments of the court of appeals in both cases should be affirmed.

Respectfully submitted.

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AUGUST 2006

APPENDIX A

UNITED STATES DISTRICT COURT
For the Southern District of Texas
Holding Session in Laredo

Case Number: 5:04CR00546-001
USM NUMBER: 35331-179

UNITED STATES OF AMERICA, PETITIONER

v.

REYMUNDO TOLEDO-FLORES, RESPONDENT

Filed: Sept. 10, 2004
Entered: Sept. 17, 2004

JUDGMENT IN A CRIMINAL CASE

☐ See Additional Aliases.
THE DEFENDANT:

Raul Martinez
Defendant's Attorney

☒ pleaded guilty to count(s) one on May 3, 2004

☐ pleaded nolo contendere to count(s) which was accepted by the court. _____

☐ was found guilty on _____ count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
8 U.S.C. § 1325	Illegal entry (felony)	02/22/2004	One

☐ See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

September 9, 2004
Date of Imposition of Judgment

/s/ GEORGE P. KAZEN
GEORGE P. KAZEN
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

[9/10/04]
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 24 months.

The defendant was advised of the right to appeal the sentence, including the right to appeal in forma pauperis, upon proper documentation

☐ See Additional Imprisonment Terms.

☐ The court makes the following recommendation to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on_____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 1 year.

☐ See Additional Supervised Release Terms.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as deter-

mined by the court. *(for offenses committed on or after September 13, 1994)*

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if appropriate.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payment sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

☒ See Special Conditions of Supervision.

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer to schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

If deported, the defendant is not to re-enter the United States illegally. If the defendant is deported during the period of probation or the supervised release term, supervision by the probation office becomes inactive. If the defendant returns, the defendant shall report to the nearest U.S. Probation Office immediately. Supervision by the probation officer reactivates automatically upon the defendant's reporting.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payment on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00		

☐ See Additional Terms for Criminal Monetary Penalties.

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)*

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

☐ If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

☐ See Additional Restitution Payees.

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment

options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the
☐ fine ☐ restitution.

☐ the interest requirement for the
☐ fine ☐ restitution is modified as follows:

☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment at not likely to be effective. Therefore, the assessment is hereby remitted.

* Findings for the total amount of losses are required under Chapter 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 13, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☒ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ installments of $ _____ over a period of _____ , to commence _____ days after the date of this judgment; or

D ☐ Payment in equal _____ installments of $ _____ over a period of _____ , to commence _____ days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Make all payments payable to U.S. District Clerk, P.O. Box 597, Laredo, TX 78042-0597

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number
Defendant and Co-Defendant Names
(including defendant number)

Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

- ☐ See Additional Defendants and Co-Defendants Held Joint and Several.
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:
- ☐ See Additional Forfeited Property.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties and (8) costs, including cost of prosecution and court costs.

APPENDIX B

SUBCHAPTER I—GENERAL PROVISIONS

§ 1101. Definitions

(a) As used in this chapter—

* * * * *

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses); or

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or

(iii) section 5861 of title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at[1] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[2] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J) an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offenses described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in section 1581, 1582, 1583, 1584, 1585, or 1588 of title 18 (relating to peonage, slavery, and involuntary servitude);

---

[1] So in original. Probably should be preceded by "is".

[2] So in original. Probably should be preceded by "is".

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information); 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;

(ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter.[3]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is

---

[3] So in original. Probably should be followed by a semicolon.

described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

(3)

No. 05-7664

In The Supreme Court of the United States

REYMUNDO TOLEDO-FLORES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Has the Fifth Circuit erred in holding – in opposition to the Second, Third, Sixth, and Ninth Circuits – that a state felony conviction for simple possession of a controlled substance is a "drug trafficking crime" under 18 U.S.C. § 924(c), and hence an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B), even though the same crime is a misdemeanor under federal law?

LIST OF PARTIES

1. United States of America.
2. Reymundo Toledo-Flores.

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United States v. Granderson, 511 U.S. 39 (1994) 38

United States v. Ibarra-Galindo, 206 F.3d 1337 (9th Cir. 2000), *cert. denied*, 531 U.S. 1102 (2001) .....*passim*

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United States v. Palacios-Suarez, 418 F.3d 629 (6th Cir. 2005) ..... *passim*

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United States v. Simon, 168 F.3d 1271 (11th Cir.), *cert. denied*, 528 U.S. 844 (1999) 26

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Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. No. 104-305, intro. comment., 110 Stat. 3807 (1996) 18

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Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(2), 104 Stat. 4978 (1990) 34

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PA. CONS. STAT. § 780-113(a)(16) 12

PA. CONS. STAT. § 780-113(b) 12

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H.R. Rep. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566 18

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OPINION BELOW

The opinion of the court of appeals (J.A. 20-21) is reported at 149 Fed. Appx. 241.

JURISDICTION

The judgment of the court of appeals (J.A. 22-23) was entered on August 17, 2005. The petition for a writ of certiorari was filed on November 15, 2005, and granted on April 3, 2006. (J.A. 24) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND SENTENCING GUIDELINES INVOLVED

Under 8 U.S.C. § 1101(a)(43)(B),

> **(43)** The term "aggravated felony" means –
>
> * * *
>
> **(B)** illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);
>
> * * * *

8 U.S.C. § 1101(a)(43)(B). "The term applies to an offense described in this paragraph whether in violation of Federal or State law * * * * " 8 U.S.C. § 1101(a)(43).

In turn, 18 U.S.C. § 924(c) defines the term "drug trafficking crime" as "mean[ing] any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et

seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." 18 U.S.C. § 924(c)(2).

Finally, § 2L1.2 of the Federal Sentencing Guidelines provides as follows:

> **§ 2L1.2. *Unlawfully Entering or Remaining in the United States***
>
> (a) Base Offense Level: **8**
>
> (b) Specific Offense Characteristic
>
> (1) Apply the Greatest:
>
> If the defendant previously was deported, or unlawfully remained in the United States, after –
>
> * * *
>
> (C) a conviction for an aggravated felony, increase by **8** levels;
>
> * * * *

USSG § 2L1.2 (emphasis in original).

The commentary to USSG § 2L1.2 provides in pertinent part that, "[f]or purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in 8 U.S.C. § 1101(a)(43) without regard to the date of conviction of the aggravated felony." USSG § 2L1.2, comment. (n.2).

STATEMENT

On April 15, 2002, in the 248th District Court of Harris County, Texas, Petitioner Reymundo Toledo-Flores, a Mexican national, was convicted of the Texas state jail felony offense of simple possession of 0.16 grams of cocaine and was sentenced to seven months' confinement. (Presentence Report ("PSR") 3, 8) On August 23, 2002, Mr. Toledo-Flores was released from that sentence to immigration authorities; and, on November 26, 2002, he was removed to Mexico via Laredo, Texas. (PSR 8)

On February 23, 2004, Mr. Toledo-Flores was apprehended by United States Border Patrol agents near Laredo, Texas. (J.A. 12) He admitted that he had entered the United States illegally the day before by wading across the Rio Grande River. (J.A. 12)

On March 16, 2004, Mr. Toledo-Flores was indicted in the Laredo Division of the Southern District of Texas for felony illegal entry in violation of 8 U.S.C. § 1325.[1] (J.A. 3) On May 3, 2004, Mr. Toledo-Flores pleaded guilty to that charge. (J.A. 6)

Applying Guideline § 2L1.2, the PSR began with a base offense level of eight under USSG § 2L1.2(a) and added eight levels to that pursuant to USSG § 2L1.2(b)(1)(C), on the ground that Mr. Toledo-Flores's 2002 Texas felony

---

[1] Mr. Toledo-Flores's illegal entry offense was a felony because it was committed subsequently to another conviction for illegal entry under 8 U.S.C. § 1325. *See* 8 U.S.C. § 1325(a). In fact, Mr. Toledo-Flores had been twice previously convicted of misdemeanor illegal entry under § 1325(a): once on January 14, 2000, in Laredo, Texas, at which time he was placed on probation for five years (PSR 5); and the second time on November 17, 2000, in Del Rio, Texas, for which he was sentenced to 180 days' imprisonment. (PSR 7)

conviction for simple possession of cocaine qualified as an "aggravated felony." (PSR 4) After a three-level reduction for acceptance of responsibility, Mr. Toledo-Flores had a total offense level of thirteen, which, coupled with his Criminal History Category of VI, resulted in a Guideline imprisonment range of thirty-three to forty-one months. (PSR 4, 9, 13) Because this range exceeded the two-year maximum prescribed by 8 U.S.C. § 1325, the Guideline "range" became twenty-four months. (PSR 13; *see also* USSG § 5G1.1(a))

Mr. Toledo-Flores objected to the PSR's characterization of his 2002 simple possession conviction as an "aggravated felony." Def. Resp. to the PSR 1-2; *see also* PSR Addendum 14A. He renewed that objection at the sentencing hearing. (J.A. 18) The district court overruled the objection and sentenced Mr. Toledo-Flores to twenty-four months' imprisonment on the felony illegal entry charge,[2] to be followed by one year of supervised release. (J.A. 18-19)

Mr. Toledo-Flores filed a timely appeal to the United States Court of Appeals for the Fifth Circuit, where he renewed his claim that his 2002 Texas felony conviction for simple possession was not a qualifying "aggravated felony." On August 17, 2005, the court of appeals rejected Mr. Toledo-Flores's argument and affirmed the judgment of conviction and sentence. (J.A. 20-23)

---

[2] The district court ordered the sentence to run consecutively to a six-month prison term for revocation of probation in the January 2000 illegal entry case. (J.A. 18)

This Court granted certiorari on April 3, 2006.[3] (J.A. 24)

SUMMARY OF ARGUMENT

A. A state narcotics conviction qualifies as an "aggravated felony" under Federal Sentencing Guideline § 2L1.2 and 8 U.S.C. § 1101(a)(43) if it constitutes "illicit trafficking in a controlled substance (as defined in section

[3] According to the Inmate Locator feature of the Federal Bureau of Prisons website (*http://www.bop.gov*, last visited June 15, 2006), Mr. Toledo-Flores was released from federal custody on April 21, 2006, undoubtedly to the detainer placed on him by immigration authorities on February 24, 2004. (PSR 1) His release from federal custody does not, however, render this case moot. While he has completed the imprisonment component of his sentence, Mr. Toledo-Flores is still subject to the supervised release component of his sentence until April 21, 2007. Removal from the United States does not extinguish the term of supervised release. *See, e.g., United States v. Brown*, 54 F.3d 234, 238-39 (5th Cir. 1995).

The existence of the supervised release term gives Mr. Toledo-Flores a concrete stake in the outcome of the question presented and prevents this case from being moot. Particularly, if he prevails in this case, Mr. Toledo-Flores can, on remand, request that the district court, in its discretion, reduce, or eliminate altogether, his supervised release term as equitable partial compensation for any excess imprisonment. "In this case, the possibility that the district court may alter [Mr. Toledo-Flores's] period of supervised release pursuant to 18 U.S.C. § 3583(e)(2), if it determines that he has served excess prison time, prevents [his] petition from being moot." *Johnson v. Pettiford*, 442 F.3d 917, 918 (5th Cir. 2006) (footnote omitted); *see also, e.g., United States v. Rodriguez-Munoz*, No. 04-11321, 2006 WL 1209382, at *1 & *3 (5th Cir. May 2, 2006) (unpublished) (finding that appeal of sentence was not moot, notwithstanding expiration of prison sentence, because defendant remained on supervised release, which could be reduced or terminated in the district court's discretion; and, based on finding of sentencing error, remanding for consideration of such relief).

802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43)(B). In turn, 18 U.S.C. § 924(c) defines the term "drug trafficking crime" as "mean[ing] any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." 18 U.S.C. § 924(c)(2).

With respect to convictions for simple possession of a controlled substance, the lower courts have adopted two competing approaches to the phrase "any felony punishable under [the enumerated federal statutes]." Under the State Felony Approach, a conviction for simple possession will qualify as an "aggravated felony" if it is punishable (as a felony or a misdemeanor) under the listed federal statutes and it was actually classified as a felony by the State of conviction. Under this approach – applied by the Fifth Circuit in this case – Mr. Toledo-Flores's conviction for simple possession of 0.16 grams of cocaine was an "aggravated felony," because Texas punished it as a felony, even though this offense is punishable only as a misdemeanor under federal law.

Under the Federal Felony Approach, in contrast, a conviction for simple possession will qualify as an "aggravated felony" only if it is punishable as a felony under federal law. The text, structure, history, policies, and purposes of the statutes at issue here demonstrate that the Federal Felony Approach is the one intended by Congress.

B. Under this Court's decision in *Jerome v. United States*, 318 U.S. 101, 104 (1943), it must be assumed, in

the absence of a plain indication to the contrary, that Congress did not intend to make the operation of a federal statute dependent upon the vagaries and disparities of various States' laws. Because the State Felony Approach makes the "aggravated felony" definition in 8 U.S.C. § 1101(a)(43)(B) dependent upon state law (particularly, whether the State at issue labels and punishes simple possession of a controlled substance as a felony), under *Jerome* and its progeny, Congress would have had to plainly indicate its intent to adopt the State Felony Approach. Congress, however, gave no such "plain indication" of its intent to adopt the State Felony Approach.

C. Indeed, the text and structure of the relevant provisions support the Federal Felony Approach, not the State Felony Approach. The ordinary and natural meaning, as well as the accepted legal meaning, of the term "trafficking," in the context of controlled substances, implies "trading or dealing" in controlled substances – *i.e.*, activities of a mercantile nature that ***exclude*** simple possession. The Federal Felony Approach is a much better fit with the ordinary and natural meaning of the term "trafficking" than the State Felony Approach because, with the exception of the recidivist possessor provisions of 21 U.S.C. § 844(a), the offenses covered by the Federal Felony Approach all target activities within the conventional notion of "trafficking."

The Federal Felony Approach is also supported by the fact that § 1101(a)(43)(B) refers to drug trafficking "as defined in [18 U.S.C. § 924(c)]," not "as defined in [18 U.S.C. § 924(c)***(2)***]" (as the statute read before 1994). The broader reference to § 924(c) includes the limitation – found in § 924(c)(1)(A) – that the "drug trafficking crime" be one "for which the person may be prosecuted in a court

of the United States," 18 U.S.C. § 924(c)(1)(A) – *i.e.*, a ***federal*** crime. Read together, these two provisions mean that a "drug trafficking crime (as defined in section 924(c) of Title 18)" must be a ***federal felony***. And this reading comports with how the lower courts have uniformly interpreted the term "drug trafficking crime" for purposes of 18 U.S.C. § 924(c)(1)(A).

Moreover, the Federal Felony Approach best comports with the ordinary and natural meaning of the phrase "any felony punishable under the Controlled Substances Act" in § 924(c)(2) – namely, an offense giving rise to felony punishment under the CSA. That interpretation is confirmed by other statutes in which Congress has used essentially identical language in tandem with separate language explicitly reaching state-law offenses.

In sum, the text and structure of the provisions at issue clearly indicate that Congress intended to adopt the Federal Felony Approach. At a minimum, Congress did not give a "plain indication" that it wanted to adopt the State Felony Approach, as required under *Jerome* and its progeny.

D. The statutory history and legislative history of the provisions at issue also support the Federal Felony Approach. With respect to the definition of "drug trafficking crime" in 18 U.S.C. § 924(c)(2), this history shows that, before 1988, § 924(c)(2) referred only to ***federal*** drug felonies; and the 1988 legislation that altered § 924(c)(2) to substantially its present language was intended to be only a ***clarification*** of the scope of that statute.

With respect to 8 U.S.C. § 1101(a)(43)(B), the statutory and legislative history indicates that this particular prohibition was aimed at high-level trafficking-type

offenses, not low-level possessory offenses. Additionally, that provision's history indicates at least tacit congressional approval of the Board of Immigration Appeals' consistent application of the Federal Felony Approach throughout the 1990s. Accordingly, the statutory history and legislative history support the Federal Felony Approach. At a minimum, they fail to override the *Jerome* presumption against the State Felony Approach.

E. Even if the text, structure, and history of the relevant provisions fail to establish the primacy of the Federal Felony Approach, that approach is still unquestionably a ***plausible*** reading of the statutes involved. That being the case, the rule of lenity (and its immigration law counterpart) require adoption of the Federal Felony Approach.

F. Finally, the Federal Felony Approach comports with the policy favoring uniformity of both federal criminal and immigration laws. And, the Federal Felony Approach avoids the grave constitutional doubts occasioned by the disparate results produced by the State Felony Approach.

G. For all these reasons, the Fifth Circuit erroneously applied the State Felony Approach in deciding Mr. Toledo-Flores's case. This Court should therefore reverse the judgment of the Fifth Circuit.

ARGUMENT

A STATE CONVICTION FOR SIMPLE POSSESSION OF A CONTROLLED SUBSTANCE IS AN "AGGRAVATED FELONY" UNDER 8 U.S.C. § 1101(a)(43)(B) ONLY IF THE OFFENSE IS PUNISHABLE AS A FELONY UNDER FEDERAL LAW. BECAUSE MR. TOLEDO-FLORES'S PRIOR OFFENSE (SIMPLE POSSESSION OF 0.16 GRAMS OF COCAINE) IS PUNISHABLE ONLY AS A MISDEMEANOR UNDER FEDERAL LAW, THE LOWER COURTS ERRED IN TREATING THAT OFFENSE AS AN "AGGRAVATED FELONY."

A. Introduction.

Based upon his 2002 Texas state jail felony conviction for simple possession of 0.16 grams of cocaine, Mr. Toledo-Flores received an eight-level enhancement under Federal Sentencing Guideline § 2L1.2(b)(1)(C), which provides that "[i]f the defendant previously was deported, or unlawfully remained in the United States, after – * * * (C) a conviction for an aggravated felony, increase [the base offense level] by **8** levels." USSG § 2L1.2(b)(1)(C) (emphasis in original). The commentary to USSG § 2L1.2 provides in pertinent part that, "[f]or purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in 8 U.S.C. § 1101(a)(43) without regard to the date of conviction of the aggravated felony." USSG § 2L1.2, comment. (n.2).

Under 8 U.S.C. § 1101(a)(43), "[t]he term 'aggravated felony' means – * * * **(B)** illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)," 8 U.S.C. § 1101(a)(43)(B), and "[t]he term applies to an offense described in this paragraph whether

in violation of Federal or State law[.]" 8 U.S.C. § 1101(a)(43). In turn, 18 U.S.C. § 924(c) defines the term "drug trafficking crime" as "mean[ing] ***any felony punishable under*** the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." 18 U.S.C. § 924(c)(2) (emphasis added).

"Courts have adopted two competing interpretations of the phrase 'any felony punishable under' the enumerated statutes listed in § 924(c)(2)." *United States v. Peralta-Espinoza*, 413 F. Supp. 2d 972, 975 (E.D. Wis. 2006) (citations omitted). Under the Federal Felony Approach, "a state drug conviction is considered an 'aggravated felony' if the elements of the crime resulting in conviction would render the defendant liable for a felony under the federal drug laws, irrespective of whether the conviction was actually obtained in the state or federal forum." *Gonzales-Gomez v. Achim*, 372 F. Supp. 2d 1062, 1066 (N.D. Ill. 2005) (citation omitted), *aff'd*, 441 F.3d 532 (7th Cir. 2006). Under the State Felony Approach, however, "a state drug possession crime is an aggravated felony if it is both punishable under the CSA [Controlled Substances Act] and labeled as a felony by the convicting state, without regard to whether the crime would be punishable under federal drug laws as a felony or only as a misdemeanor." *Id.* at 1067 (footnote omitted).

Mr. Toledo-Flores's prior offense – simple possession of 0.16 grams of cocaine – was a state jail felony under the laws of Texas, *see* TEX. HEALTH & SAFETY CODE §§ 481.102(3)(D) & 481.115(b), but only a misdemeanor under federal law as well as under the law of several other States. *See* 21 U.S.C. § 844(a); *see also, e.g.*, DEL. CODE tit.

16, § 4753; MASS. GEN. LAWS ch. 94c, § 34; 35 PA. CONS. STAT. § 780-113(a)(16) & (b); TENN. CODE § 39-17-418(a) & (c); W. VA. CODE § 60A-4-401(c); WISC. STAT. § 961.41(3g)(c); WYO. STAT. § 35-7-1031(c)(i). Under the State Felony Approach employed by the Fifth Circuit in this case, Mr. Toledo-Flores's prior offense qualified as a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) and hence an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B) and USSG § 2L1.2(b)(1)(C). Under the Federal Felony Approach, however, that prior conviction would not have qualified. As will be discussed, the text, structure, history, policies, and purposes of the relevant statutory provisions strongly support the Federal Felony Approach.[4]

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[4] The Second and Ninth Circuits have read the statutory text under consideration here differently in immigration cases and criminal cases. *Compare Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 910-18 (9th Cir. 2004) (adopting Federal Felony Approach in immigration case), *and Aguirre v. INS*, 79 F.3d 315, 317-18 (2d Cir. 1996) (same), *with United States v. Ibarra-Galindo*, 206 F.3d 1337, 1339-41 (9th Cir. 2000) (adopting State Felony Approach in Sentencing Guidelines case), *cert. denied*, 531 U.S. 1102 (2001), *and United States v. Pornes-Garcia*, 17 F.3d 142, 145-48 (2d Cir.) (same), *cert. denied*, 528 U.S. 880 (1999). Since the Second and Ninth Circuits' cases were decided, however, this Court has conclusively rejected "the dangerous principle that judges can give the same statutory text different meanings in different cases," *Clark v. Martinez*, 543 U.S. 371, 386 (2005), and has held instead that "we must interpret [a] statute consistently, whether we encounter its application in a criminal or noncriminal context." *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (citation omitted). The Court should, therefore, accord the relevant statutory language the same meaning both in this case and in *Lopez v. Gonzales*, No. 05-547.

B. Under the Background Presumption of *Jerome v. United States*, 318 U.S. 101, 104 (1943), It Must Be Assumed, Absent a "Plain Indication to the Contrary," that Congress Intended to Adopt the Federal Felony Approach, Not the State Felony Approach.

Under the Federal Felony Approach, a simple possession offense will qualify as an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) – or not – irrespective of whether it is labeled or punished as a felony under the law of the particular State in which the conviction is sustained. In contrast, under the State Felony Approach, whether a simple possession offense qualifies as an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) will depend on how the particular State of conviction has characterized the offense conduct; hence, the same offense may or may not be an aggravated felony, depending on the State in which the conviction is sustained. As such, the interpretive question presented by this case must be informed by the long-standing background presumption that

> in the absence of a plain indication to the contrary, [] Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide and at times on the fact that the federal program would be impaired if state law were to control.

Jerome v. United States, 318 U.S. 101, 104 (1943) (citations omitted).

This Court has repeatedly applied the *Jerome* presumption in both criminal and civil cases, and in contexts closely analogous to that presented here.[5] Indeed, *Jerome* itself is very similar to the instant case. At issue in *Jerome* was the portion of the Bank Robbery Act providing that it was a crime to "enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building or part thereof, so used, any felony or larceny." *See Jerome*, 318 U.S. at 101-02. The particular question was whether the utterance of a forged security – a felony under Vermont law, but not under any federal statute – could qualify as the "any felony" under this statute. *See id.* at 102. Noting that it "must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law," *id.* at 104, and finding no such indication, the Court held that the term "any felony" did not incorporate felonies under state law. *See id.* at 104 & 108.

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[5] *See, e.g.*, *Taylor v. United States*, 495 U.S. 575, 591-92 (1990) (declining to read the word "burglary" in 18 U.S.C. § 924(e) as encompassing any offense labeled by a State as "burglary," and instead adopting a "uniform definition independent of the labels employed by the various States' criminal codes"); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43-44 (1989) (declining to interpret the term "domicile" in the Indian Child Welfare Act as turning on state law); *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 119-20 (1983) (declining to interpret federal firearms disability provisions as turning on the vagaries of state law pertaining to expunction of convictions), *superseded by statute*, Firearms Owners' Protection Act, Pub. L. No. 99-308, § 101(5), 101 Stat. 449, 450 (1986); *United States v. Turley*, 352 U.S. 408, 411 (1957) (declining, in context of National Motor Vehicle Theft Act, to interpret the word "stolen" in accordance with definition of statutory larceny in the State where the taking occurred and instead adopting a uniform national definition).

Because the State Felony Approach makes the "aggravated felony" definition in 8 U.S.C. § 1101(a)(43)(B) dependent upon state law (particularly whether the State at issue labels and punishes simple possession of a controlled substance as a felony), under *Jerome* and its progeny, Congress would have had to plainly indicate its intent to adopt the State Felony Approach. Congress, however, gave no such "plain indication" of its intent to adopt the State Felony Approach. To the contrary, as will be demonstrated below, the text and history of the provisions at issue demonstrate that Congress intended to adopt the Federal Felony Approach.

C. The Text and Structure of the Statutory Provisions at Issue Here Support the Federal Felony Approach.

As relevant here, the term "aggravated felony" means "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43)(B). Because the term "illicit trafficking" is not defined, it should be given its ordinary or natural meaning. *See, e.g.*, *Leocal*, 543 U.S. at 9 ("When interpreting a statute, we must give words their 'ordinary or natural' meaning.") (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)).

The ordinary and natural meaning of the word "trafficking" is "the trading or dealing of goods." *Matter of Davis*, 20 I. & N. Dec. 536, 541, 1992 WL 443920 (BIA 1992) (citing definitions of "traffic" and "trafficking" found in BLACK'S LAW DICTIONARY 1340 (5th ed. 1979)). "[This] specific reading of the term trafficking comports well with the legal and everyday usages of that term." *Kuhali v.*

Reno, 266 F.3d 93, 108 (2d Cir. 2001) (citing the definition of "traffic" found at WEBSTER'S NEW COLLEGIATE DICTIONARY 1229). "[I]llicit trafficking in a controlled substance" is, therefore, in ordinary and natural (as well as legal) usage, "the unlawful trading or dealing of any controlled substance." *Davis*, 20 I. & N. Dec. at 541 (citation omitted). "The offense of simple possession would appear to be one example of a drug-related offense not amounting to the common definition of 'illicit trafficking.'" *Id.* (footnote omitted).

Although the simple possession of a controlled substance does not fit within the legal or everyday meaning of the phrase "illicit trafficking in a controlled substance," there remains the matter of the appended phrase "including a drug trafficking crime (as defined in section 924(c) of Title 18)." The meaning of the "including" phrase in § 1101(a)(43)(B) should, however, be informed – and limited – by what precedes it, namely, the "illicit trafficking" phrase.

In *Young v. United States*, 315 U.S. 257 (1942), the Court applied this principle to a similar question of statutory interpretation. At issue in *Young* was the provision in the Harrison Anti-Narcotic Act that imposed a records-keeping requirement upon "any manufacturer, producer, compounder, or vendor (including dispensing physicians) of [various opiate-containing preparations and remedies]." In that case, a physician was convicted under this provision for giving such preparations and remedies to patients whom he personally attended without keeping any records thereof. The Court, however, read the phrase "including dispensing physicians" as informed and limited by the words that preceded it and held that, as so limited, the statutory phrase did not apply to a physician (like Dr.

Young) who administered such preparations to patients whom he personally attended. *See id.* at 259-60.

Under the interpretive principle demonstrated by *Young*, it is arguable that no drug offense, whether state or federal, may be considered an "aggravated felony" under § 1101(a)(43)(B) unless it fits within the common definition of "illicit trafficking in a controlled substance." *But see Gerbier v. Holmes*, 280 F.3d 297, 307-08 n.8 (3d Cir. 2001) (observing that "there is some intuitive appeal to th[is] argument," but ultimately rejecting it). Under this approach, no simple possession offense, either state or federal, could ever qualify as an "aggravated felony" under § 1101(a)(43)(B).

But even if not limited in this fashion by the antecedent phrase "illicit trafficking in a controlled substance," the phrase "drug trafficking crime (as defined in section 924(c) of Title 18)" in § 1101(a)(43)(B) is still better read in accordance with the Federal Felony Approach. First, the Federal Felony Approach is a much better fit with the ordinary and natural meaning of "drug trafficking" – namely, "trading and dealing" in narcotics, or activity of a "business or merchant nature," *Davis*, 20 I. & N. Dec. at 541 – than the State Felony Approach. This is so because, with the exception of the recidivist possessor provisions of 21 U.S.C. § 844, the offenses punished as felonies under the three federal acts listed in § 924(c)(2) all fit within the ordinary and natural understanding of "drug trafficking";[6]

[6] At first blush, it would appear that there are three additional exceptions to this generalization. The Controlled Substances Act punishes as a felony the simple possession of more than five grams of cocaine base (also known as "crack cocaine"), as well as the simple possession of flunitrazepam (also known as "Rohypnol"). *See* 21 U.S.C. § 844(a). And the Controlled Substances Import and Export Act punishes as a felony the possession of controlled substances on board any vessel or aircraft or other vehicle arriving in or departing from the United States. *See* 21 U.S.C. § 955.

(Continued on following page)

whereas the State Felony Approach sweeps in ***all*** state felony simple possession offenses, in broad contravention of that ordinary and natural meaning.

An examination of the history behind these provisions, however, shows that Congress viewed these offenses as surrogates for more traditional trafficking-type offenses. For example, the legislative history rejecting the Sentencing Commission's proposed alteration of the 100-to-1 ratio between powder cocaine and cocaine base/crack cocaine makes clear that Congress viewed simple possession of more than five grams of crack cocaine as tantamount to trafficking. *See* H.R. Rep. 104-272, at 2-3 (1995), *reprinted in* 1995 U.S.C.C.A.N. 335, 336 (noting that "the possession of even relatively small amounts of crack is frequently inseparable from the trafficking of crack," that "the unique nature of the crack cocaine trafficking trade [] often entails trafficking in much smaller quantities of crack cocaine than with powder cocaine," and that "[w]hile 21 U.S.C. § 844 is a possession offense, it presumes that an offender who possesses 5 grams of crack generally possesses it with the intent to distribute").

Likewise, the legislative history behind the felony flunitrazepam proscription indicates that Congress was, first and foremost, concerned not about simple possession of this drug *per se*, but rather about the (involuntary) distribution of this "date rape" drug to unwitting victims for purposes of rape or sexual assault. The increased penalty for simple possession of flunitrazepam was passed as § 2(c) of the Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. No. 104-305, 110 Stat. 3807 (1996), whose avowed purpose was "to combat drug-facilitated crimes of violence, including sexual assaults." *Id.*, intro. comment., 110 Stat. at 3807.

Finally, the felony possession proscription contained in 21 U.S.C. § 955 was viewed as being merely part and parcel of a broader effort to control the import and export of controlled substances into and from the United States (quintessential "trafficking"), in part to comply with the United States' treaty obligations under the Single Convention on Narcotic Drugs of 1961. *See* H.R. Rep. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4572 & 4637-39; *see also United States v. Feld*, 514 F. Supp. 283, 288 (E.D.N.Y. 1981) ("It is clear that 21 U.S.C. [§] * * * 955 [is] among the penal provisions that the United States has adopted to effectuate its treaty obligations under the Single Convention.") (citations omitted).

Additionally, it is highly significant that § 1101(a)(43)(B) no longer refers just to the definition of "drug trafficking crime" found in § 924(c)(2) (as it once did), but rather now refers more globally to the definition of "drug trafficking crime" contained in ***all*** of § 924(c).[7] As such, the phrase "drug trafficking crime (as defined in section 924(c) of Title 18)" incorporates not just the definition found in § 924(c)(2), but also the limitation (found in § 924(c)(1)(A)) that it must be a "drug trafficking crime" "for which the person may be prosecuted in a court of the United States," 18 U.S.C. § 924(c)(1)(A) – *i.e.*, a ***federal*** crime.[8] Read together, these two provisions mean that a "drug trafficking crime (as

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[7] In 1994, Congress specifically amended § 1101(a)(43)(B) to refer more generally to "section 924(c)," rather than "section 924(c)(2)," as § 1101(a)(43)(B) had read before. *See* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222(a), 108 Stat. 4305, 4320-21 (1994).

[8] In interpreting a related provision, courts have adopted similar reasoning. Section 924(h) of Title 18 punishes anyone who knowingly transfers a firearm, knowing that the firearm will be used to commit a crime of violence (as defined in § 924(c)(3)) or a drug trafficking crime (as defined in § 924(c)(2)). On its face, § 924(h) does not appear to limit the predicate "crime of violence" or "drug trafficking crime" to only federal crimes. Nevertheless, in interpreting § 924(h), courts have held that the predicate "crime of violence" cannot be a state offense, but rather must be a federal offense. *See, e.g.*, *United States v. McLemore*, 28 F.3d 1160, 1162-65 (11th Cir. 1994); *United States v. Acosta*, 124 F. Supp. 2d 631, 634-38 (E.D. Wis. 2000).

As part of their reasoning, these courts have concluded that the fact that "the definition of 'crime of violence' contained in section 924(c)(3) includes a reference to the federal limitation contained in section 924(c)(1)" makes it at least equally plausible that Congress intended to limit § 924(h)'s scope to only ***federal*** predicate felonies. *McLemore*, 28 F.3d at 1162-63; *accord Acosta*, 124 F. Supp. 2d at 634. A similar conclusion is even more strongly warranted in this case, given § 1101(a)(43)(B)'s explicit reference to ***all*** of § 924(c) – including, of course, "the federal limitation contained in section 924(c)(1)."

defined in section 924(c) of Title 18)" must be a ***federal felony***.[9]

In this regard, it is also significant that, for purposes of the substantive prohibition to which § 924(c)(2) is attached – namely, the prohibition on using, carrying, or possessing a firearm during and in relation to any crime of violence or drug trafficking crime, *see* 18 U.S.C. § 924(c)(1)(A) – the lower courts have uniformly held that the predicate "drug trafficking crime" must be one that ***federal law punishes as a felony***; and that simple possession of a controlled substance, unless punished as a felony under federal law, does not qualify.[10] And, indeed, the Government has, in a previous case before this Court,

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[9] Of course, under the last paragraph of 8 U.S.C. § 1101(a)(43), state law analogues of these federal felony offenses are also included in the definition of "aggravated felony." That fact, however, does not speak to how the phrase "drug trafficking crime (as defined in [§] 924(c) of Title 18)" should be construed.

[10] *See, e.g.*, *United States v. Bradley*, 381 F.3d 641, 647-48 n.5 (7th Cir. 2004); *United States v. Smith*, 20 Fed. Appx. 258, 269 (6th Cir. 2001) (unpublished) (after finding evidence insufficient to support any drug charges besides simple possession of cocaine, court also reversed conviction under § 924(c)(1) because "[defendant's] conviction for cocaine possession is a misdemeanor offense, and as such, cannot serve as the underlying predicate offense for the § 924(c) charge"); *United States v. Garnett*, 243 F.3d 824, 829 (4th Cir. 2001) ("possession of less than five grams of cocaine base constitutes a misdemeanor only and cannot serve * * * as 'a drug trafficking offense,' for purposes of 18 U.S.C. § 924(c)(1)") & *id.* at 830 ("hold[ing] that purchase, *i.e.*, possession, of a ***felony*** amount of cocaine base in violation of 21 U.S.C. § 844, constitutes a 'drug trafficking crime' for purposes of section 924(c)") (emphasis in original); *United States v. White*, 969 F.2d 681, 684 (8th Cir. 1992) (noting that, if defendant prevailed on his claim – namely, that the evidence was sufficient only to support a charge of simple possession, rather than possession with intent to distribute – "his § 924(c)(1) conviction would be reversed because a simple possession offense is not a predicate 'drug trafficking crime' ").

all but conceded this premise. *See* Brief for the United States in Opposition 10-12, *Price v. United States*, 537 U.S. 1152 (2003) (No. 01-10940) [hereinafter cited as "BIO"]. In *Price*, the issue was whether, for purposes of a prosecution under 18 U.S.C. § 924(c)(1), the Fifth Circuit had incorrectly characterized the defendant's federal conviction for simple possession of cocaine base as a felony based on prior drug possession convictions, where the requisite enhancement notice had not been given pursuant to 21 U.S.C. § 851. The petitioner argued that, "given the [G]overnment's failure to provide the notice required by 21 U.S.C. 851(a), his drug possession offense could not carry a sentence of more than one year and therefore could not serve as a predicate 'drug trafficking crime' under Section 924(c)." BIO 10 (footnote omitted). The Government "agree[d] with petitioner that, in the absence of proper notice under 21 U.S.C. 851(a), the drug possession offense did not qualify as a felony for purposes of Section 924(c)." BIO 10-11. The Government noted that

> a drug possession offense is punishable as a felony under the Controlled Substances Act by virtue of the defendant's recidivism only if the government has filed a notice under 21 U.S.C. 851(a). Because no such notice was filed in this case, the court of appeals erred in concluding that petitioner's drug possession offense qualified as a predicate felony under Section 924(c).

BIO 12.

Underlying the Government's concessions in *Price* was its recognition that, for purposes of the crime described in 18 U.S.C. § 924(c)(1)(A), the crime of simple possession of a controlled substance is a qualifying "drug trafficking crime" ***only*** when that crime is punishable as a felony

under federal law. And the Court appeared to agree with that proposition, for it granted certiorari, vacated the judgment below, and remanded to the Court of Appeals for further consideration in light of *United States v. LaBonte*, 520 U.S. 751, 759-60 (1997), "and the Solicitor General's acknowledgment that the Court of Appeals 'erred in concluding that petitioner's drug possession offense qualified as a predicate felony' under 18 U.S.C. § 924(c) in the absence of notice under 21 U.S.C. § 851(a)." *Price*, 537 U.S. at 1152 (citation to Brief in Opposition omitted).[11]

The ordinary meaning of the phrase "any felony punishable under the Controlled Substances Act" in 18 U.S.C. § 924(c)(2) likewise supports the Federal Felony Approach. The phrase "punishable under the Controlled Substances Act" modifies and informs the meaning of "any felony." "Punishable" means "giving rise to a specified punishment." BLACK'S LAW DICTIONARY 1269 (8th ed. 2004). A "felony punishable under the Controlled Substances Act" thus means a felony offense that "giv[es] rise to a specified punishment" "under the Controlled Substances Act." The ordinary and plain meaning of § 924(c)(2) is therefore that an offense qualifies as a "drug trafficking crime" under § 924(c) only if it "giv[es] rise to a specified punishment" – a sentence of imprisonment in excess of one year, that is, a "felony" sentence – ***under the***

[11] The dissenters in *Price* likewise appeared to agree with this proposition. Justice Scalia dissented from the Court's GVR order because he believed that the jury had correctly found, and that the evidence clearly showed, that petitioner had used and carried the firearm in question during and in relation to the federal felony of possession of more than five grams of cocaine base. *See Price*, 537 U.S. at 1157-58 (Scalia, J., dissenting); *see also id.* at 1158 (Kennedy, J., dissenting) (agreeing with Justice Scalia's dissent).

specified federal laws.[12] Yet, as has been noted, simple possession of less than one gram of cocaine is not punishable in excess of one year under the Controlled Substances Act. *See* 21 U.S.C. § 844.

This interpretation of the phrase "any felony punishable under the Controlled Substances Act" in § 924(c)(2) is strongly supported by the way Congress used the phrase "punishable under" in another section of the very same statute, passed in the same Act of Congress as the current version of § 924(c)(2). In 18 U.S.C. § 924(g) (originally enacted as 18 U.S.C. § 924(f) by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6211, 102 Stat. 4181, 4359-60 (1988)), Congress has provided as follows:

> (g) Whoever, with the intent to engage in conduct which –
>
> > (1) constitutes an offense listed in section 1961(1),
> >
> > (2) ***is punishable under the Controlled Substances Act (21 U.S.C. 802 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.),***

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[12] *Cf. Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 281 (1992) (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he statute [18 U.S.C. § 1961(1) defines 'racketeering activity' to include 'any offense involving * * * fraud in the sale of securities * * * punishable under any law of the United States.' * * * '[A]ny offense . . . punishable under the laws of the United States' presumably means that Congress intended to refer to the federal securities laws and not common-law tort actions for fraud.").

> (3) ***violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)))***, or
>
> (4) constitutes a crime of violence (as defined in subsection (c)(3)),
>
> travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

18 U.S.C. § 924(g) (emphasis added).

The inclusion of subsection (3) in § 924(g), by the same Congress that enacted the present version of § 924(c)(2), clearly indicates that Congress did not intend for the phrase "punishable under the Controlled Substances Act" to refer to state-law offenses. The inference arising from the difference between § 924(c)(2) and § 924(g) is especially strong given that these provisions were enacted by the same Congress in consecutive sections of the same Act. *See, e.g., Lindh v. Murphy*, 521 U.S. 320, 330 (1997) (referring to "the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted") (citing *Field v. Mans*, 516 U.S. 59, 75 (1995)).

And, there are other statutory provisions that are structured similarly to § 924(g). For example, in the same statute at issue here, § 924(k) punishes anyone who

smuggles or brings into the United States (or attempts to do so) a firearm

> with intent to engage in or promote conduct that –
>
> > (1) is punishable under the Controlled Substances Act (21 U.S.C. 802 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.); [or]
> >
> > (2) violates any State law relating to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
>
> * * * *

18 U.S.C. § 924(k). *See also, e.g.*, 18 U.S.C. § 3559(c)(2)(H)(i) & (ii) (for purposes of the federal "three strikes" statute, defining the term "serious drug offense" as "(i) an offense that is ***punishable under*** section 401(b)(1)(A) or 408 of ***the Controlled Substances Act*** * * * ; ***or*** (ii) an ***offense under State law*** that, had the offense been prosecuted in a court of the United States, would have been punishable under section 401(b)(1)(A) or 408 of the Controlled Substances Act * * * * ") (emphasis added).

Clearly, in these statutes, Congress used the phrase "punishable under" to include only federal offenses and not state offenses punishable under an analogous state law. Otherwise, Congress would not have added the separate clauses that specified analogous state drug laws. Notably, however, in 18 U.S.C. § 924(c)(2), Congress did not include such a separate clause for analogous state felony drug crimes. In other words, "Congress knew how to impose * * * liability [on the basis of state-law offenses] when it

chose to do so," *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994), but it did not choose to do so in § 924(c)(2). That is strong evidence that Congress did not intend for state drug offenses that are felonies under state law but misdemeanors under federal law to fall within the ambit of § 924(c)(2). In sum, the fact that "any felony" is modified by the phrase "punishable under the Controlled Substances Act" indicates that Congress intended "any felony" to include only offenses punishable as federal felonies under federal law and not state felonies that are concurrently "punishable" as misdemeanors under federal penal laws.

For all the reasons discussed above, the Federal Felony Approach is a much better reading of the statutory provisions at issue here than the State Felony Approach. Some courts have concluded otherwise, however, relying principally on 21 U.S.C. § 802(13). These courts reason as follows: the phrase "any felony punishable under [the listed federal statutes]" incorporates the definition of "felony" in 21 U.S.C. § 802(13), namely: "any Federal or State offense classified by applicable Federal or State law as a felony." And, these courts reason, "[s]ection 802(13)'s explicit reliance on state classifications represents a Congressional choice to include within the category of 'felony' offenses under [the listed federal statutes] those crimes deemed serious enough by states to warrant felony treatment within their jurisdictions." *Jenkins v. INS*, 32 F.3d 11, 14 (2d Cir. 1994).[13]

[13] *See also, e.g., Lopez v. Gonzales*, 417 F.3d 934, 937 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1651 (2006); *United States v. Wilson*, 316 F.3d 506, 512-13 (4th Cir.), *cert. denied*, 538 U.S. 1025 (2003); *United*

(Continued on following page)

These courts' reliance on § 802(13) is misplaced, for several reasons. First, as Judge Canby has aptly observed, "the definition in 21 U.S.C. § 802(13) is utterly irrelevant to our purpose," because

> [t]his definition [] refers to the meaning of "felony" only "[a]s used in this subchapter [*i.e.*, Subchapter I of Title 21, 21 U.S.C. §§ 801-904]." We are not defining "felony" as used in this subchapter, or any subchapter, of Title 21. We are defining felony as used in 18 U.S.C. § 924(c)(2).

Ibarra-Galindo, 206 F.3d at 1343 (Canby, J., dissenting); *see also United States v. Palacios-Suarez*, 418 F.3d 692, 698 (6th Cir. 2005) (making same point); *Peralta-Espinoza*, 413 F. Supp. 2d at 977 (same); *Matter of L– G–*, 21 I. & N. Dec. 89, 98, 1995 WL 582051 (BIA 1995) (same).

Furthermore,

> § 802(13) does not define any substantive offense under the Controlled Substances Act. Rather, § 802(13) defines "felony" for purposes of sentencing enhancements for the substantive crimes set forth in [Title] 21, *see, e.g.*, 21 U.S.C. § 841(b)(1) (1999) (raising the sentence for an 841(b)(1) conviction if the violation occurs "after a prior conviction for a felony drug offense"), but we are not defining "felony" for purposes of sentencing enhancements. We are defining "felony" for purposes of substantive drug crimes.

States v. Simon, 168 F.3d 1271, 1272 (11th Cir.), *cert. denied*, 528 U.S. 844 (1999); *United States v. Restrepo-Aguilar*, 74 F.3d 361, 364-65 (1st Cir. 1996).

Gerbier, 280 F.3d at 309; *see also id.* at 309-10; *see also Gonzales-Gomez v. Achim*, 441 F.3d 532, 534 (7th Cir. 2006) (making same point); *Peralta-Espinoza*, 413 F. Supp. 2d at 977 (same); *L- G-*, 21 I. & N. Dec. at 98 (same).

Put another way, "[t]he fact that 'felony' is defined [in § 802(13)] to include a state felony doesn't imply, however, that a state felony is ***punishable*** under the Controlled Substances Act * * * * The Controlled Substances Act does not purport to punish state drug felonies; rather, it indicates that a state felony conviction can be used to enhance the federal sentence of a defendant convicted of violating the Act." *Gonzales-Gomez*, 441 F.3d at 534 (emphasis in original). For these reasons, § 802(13) offers no support for the State Felony Approach.

Additionally, in the particular context of the Sentencing Guidelines, some courts have found support for the State Felony Approach in the commentary to USSG § 2L1.2, which defines the term "felony" as "any federal, ***state***, or local offense punishable by imprisonment for a term exceeding one year," USSG § 2L1.2, comment. (n.2) (emphasis added). *See, e.g.*, *Ibarra-Galindo*, 206 F.3d at 1339-40; *see also Peralta-Espinoza*, 413 F. Supp. 2d at 976 (collecting cases). As the Sixth Circuit has observed, "[r]eliance on this definition is misplaced, however, because the commentary specifically states that the definition of a 'felony' applies '[f]or purposes of subsection (b)(1)(A), (B), and (D).' Therefore, the definition of the term 'felony' does not have any bearing on the term 'aggravated felony' in subsection (b)(1)(C) of § 2L1.2." *Palacios-Suarez*, 418 F.3d at 698 (citation omitted). Indeed, if anything, under the principle of *expressio unius est exclusio alterius*, "[t]he Commission's omission of § 2L1.2(b)(1)(C) from this note actually supports the [] [Federal] [F]elony [A]pproach."

Peralta-Espinoza, 413 F. Supp. 2d at 977 (footnote and citations omitted).

In sum, "[b]ecause common sense rebels at the thought of classifying bare possession of a tiny amount of narcotics as a drug trafficking crime, [this Court] should not adopt that interpretation unless the statutory language compels [the Court] to conclude that Congress intended such a startling result." *Ibarra-Galindo*, 206 F.3d at 1341 (Canby, J., dissenting). But "[t]he statutory language compels no such conclusion." *Id.* (Canby, J., dissenting). Indeed, as set forth above, the statutory language strongly suggests precisely the ***opposite*** conclusion – namely, that Congress intended to adopt the Federal Felony Approach.

In any event, Congress certainly did not give "a plain indication" that it intended to "mak[e] the application of the federal act dependent on state law," *Jerome*, 318 U.S. at 104; and that is sufficient reason, under *Jerome* and its progeny, to presume that Congress intended the Federal Felony Approach rather than the State Felony Approach. The Fifth Circuit therefore erred in applying the State Felony Approach in deciding Mr. Toledo-Flores's claim.

D. The Statutory and Legislative History of the Relevant Provisions Supports the Federal Felony Approach.

As discussed above, the relevant statutory text plainly supports the Federal Felony Approach, especially when viewed in light of the *Jerome* presumption against making the meaning of a federal statute depend on State law. Lest there remain any doubt, however, both the statutory

history and the legislative history of the provisions at issue likewise support the Federal Felony Approach.[14]

1. History of 18 U.S.C. § 924(c).

As the Sixth Circuit has explained,

> Prior to 1988, § 924(c)(2) defined the term "drug trafficking crime" as "any ***felony violation of Federal law*** involving the distribution, manufacture, or importation of any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802))." 18 U.S.C. § 924(c)(2) (1982 & Supp. IV 1986) (emphasis added). Thus, the prior statutory language plainly reveals that a "drug trafficking crime" was limited to ***only federal felony offenses***. In the Anti-Drug Abuse Act of 1988, Pub.

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[14] By the term "statutory history," Mr. Toledo-Flores refers only to predecessor versions of the same statutes; by the term "legislative history," he refers to other evidence of the legislative process (*e.g.*, committee reports, floor debates, and preliminary, unenacted bills). Mr. Toledo-Flores recognizes that, for purposes of statutory construction of penal statutes, some Members of the Court have drawn a distinction between the former and the latter. *Compare Almendarez-Torres v. United States*, 523 U.S. 224, 265 (1998) (Scalia, J., dissenting) ("agree[ing] that [] statutory history is a legitimate tool of construction"), *with United States v. R.L.C.*, 503 U.S. 291, 307 (1992) (Scalia, J., concurring in part and concurring in the judgment) ("it is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history") & *id.* at 311 (Thomas, J., concurring in part and concurring in the judgment) (agreeing with this proposition). Because, however, both the statutory history and the legislative history of the provisions at issue in this case support the Federal Felony Approach urged by Mr. Toledo-Flores, this case does not require this Court to address to what extent legislative history may be used to clarify the text of a penal statute.

> L. No. 100-690 § 6212, 102 Stat. 4181, 4360, Congress amended the subsection into its present-day form, defining the term "drug trafficking crime" as "any felony punishable under" the three enumerated statutes. 18 U.S.C. § 924(c)(2). Congress titled the section of this Act which amended § 924(c)(2) as a "***clarification*** of definition of drug trafficking crimes." * * * Thus, the original understanding of that term as limited to federal felonies was unchanged.

Palacios-Suarez, 418 F.3d at 698-99 (emphasis in original).

As might be expected,"[t]here is nothing in the legislative history to suggest that Congress intended this 'clarification' to dramatically widen the scope of 'drug trafficking crime' to include, for example, simple drug possession punished as a felony by a state." *Cazarez-Gutierrez*, 382 F.3d at 915 (citation omitted). To the contrary,

> Senator Biden, who was Chairman of the Senate Judiciary Committee and a principal drafter and supporter of the Act, explained that the amendment "clarifies the scope of 18 U.S.C. §§ 924(c) and 929(a). Those statutes create offenses of using or carrying a firearm and armor piercing ammunition, respectively, in certain federal crimes including drug trafficking crimes." 134 Cong. Rec. S17360, S17363 (Section Analysis of Judiciary Comm. Issues in H.R. 5210 by Sen. Biden). The amendment was intended to make clear that "drug trafficking crime" includes "possession with intent to distribute, or attempt and conspiracy violations." *Id.*; *see also United States v. Contreras*, 895 F.2d 1241, 1244 (9th Cir. 1990) (noting that Congress "labeled the change a 'clarification,' indicating that it had always considered possession

> with intent to distribute – a felony punishable under the Controlled Substances Act – a drug trafficking crime within the meaning of section 924(c)").

Id.; *see also Gonzales-Gomez*, 372 F. Supp. 2d at 1070-71. "Thus, the changes made in 1988 as now codified in section 924(c) were never intended to broaden the provision's scope to include state offenses, but rather to simply clarify the scope in terms of the ***types*** of federal crimes included." *Gonzales-Gomez*, 372 F. Supp. 2d at 1071 (emphasis in original).

Other courts that have examined this history agree that, "[a]s a clarification, the 1988 amendments [to 18 U.S.C. § 924(c)(2)] did nothing to change the fact that the felony violation must be of federal, not state, law." *Gerbier*, 280 F.3d at 309; *accord Ibarra-Galindo*, 206 F.3d at 1342 (Canby, J., dissenting); *Peralta-Espinoza*, 413 F. Supp. 2d at 977-78. In short, the history of § 924(c) supports the Federal Felony Approach. *Peralta-Espinoza*, 413 F. Supp. 2d at 977.

2. History of 8 U.S.C. § 1101(a)(43).

"The legislative history of 8 U.S.C. § 1101(a)(43) also lends support to the [] [Federal] [F]elony [A]pproach." *Id.* As the Third Circuit has explained:

> The "aggravated felony" concept was introduced into the INA [Immigration and Nationality Act] by the Anti-Drug Abuse Act of 19[8]8, Pub. L. No. 100-690, 102 Stat. 4181 (1988) ("ADAA"). Section 1101(a)(43) was added to the INA pursuant to § 7342 of the ADAA, which defined the term "aggravated felony" as it pertains to a drug offense as "any drug trafficking crime as defined

> in section 924(c)(2) of title 18, United States Code * * * * "

Gerbier, 280 F.3d at 304 (footnote omitted).[15] Furthermore,

> [a]lthough the discussion of the application of this amendment was sparse, before the Senate began voting on the ADAA, Senator D'Amato, a proponent of the immigration provisions of the ADAA, described the provisions as "focusing on a particularly dangerous class of 'aggravated alien felons,' that is, aliens convicted of murder, and drug and firearms trafficking." 134 Cong. Rec. S17301, S17318. The narrow list of serious crimes targeted, in the context of an Act with a general focus on fighting international drug cartels, suggest that the broadly-worded definition of drug trafficking was not intended to encompass minor state drug offenses with no trafficking element where they are punished as felonies under state law but as misdemeanors under federal law.

Cazarez-Gutierrez, 382 F.3d at 915-16; *see also Gonzales-Gomez*, 372 F. Supp. 2d at 1071 (drawing same conclusion).

A question arose, however, as to whether this definition of "aggravated felony" encompassed state crimes that were analogues of those described in the federal statutes enumerated in § 924(c)(2), or whether, rather, the definition was limited only to convictions obtained under the

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[15] Of course, as noted above, § 6212 of the ADAA at the same time amended the text of § 924(c)(2) to its present form, namely, "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." *See also Gerbier*, 280 F.3d at 304.

listed federal statutes. In *Matter of Barrett*, 20 I. & N. Dec. 171, 1990 WL 385754 (BIA 1990), the Board of Immigration Appeals ("BIA") adopted the former approach but, along the way, clarified its view that, in order to qualify as "aggravated felonies," state offenses must be analogues of ***federal felony offenses*** under the listed statutes. *See Barrett*, 20 I. & N. Dec. at 175 ("As such, we find that the definition of 'drug trafficking crime' at 18 U.S.C. § 924(c)(2), as incorporated into the Immigration and Nationality Act by section 101(a)(43) of the Act, includes a state conviction sufficiently analogous to a ***felony offense under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act***.") (emphasis added).

Not long after the *Barrett* decision, Congress, in the Immigration Act of 1990, amended the definition of "aggravated felony" to include "any illicit trafficking in any controlled substance (as defined in section 102 of the Controlled Substances Act), including any drug trafficking crime as defined in section 924(c)(2) of Title 18, United States Code," Pub. L. No. 101-649, § 501(a)(2), 104 Stat. 4978, 5048 (1990), and provided that the term "aggravated felony" "applies to offenses described in the previous sentence whether in violation of Federal or State law." *Id.* at § 501(a)(5), 104 Stat. at 5048. "It is clear from the House Judiciary Committee Report on the bill that Congress intended to codify *Barrett* with this amendment." *Cazarez-Gutierrez*, 382 F.3d at 916. Particularly, that Committee Report stated:

> Current law clearly renders an alien convicted of a Federal drug trafficking offense an aggravated felon. It has been less clear whether a state drug

> trafficking conviction brings that same result, although the Board of Immigration Appeals in *Matter of Barrett* (March 6, 1990) has recently ruled that it does. Because the Committee concurs with the recent decision of the Board of Immigration Appeals and wishes to end further litigation on this issue, section 1501 of H.R. 5269 specifies that drug trafficking (and firearms/destructive device trafficking) is an aggravated felony whether or not the conviction occurred in state or Federal court.

H.R. Rep. 101-681, pt. 1, at 147 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6553.

To be sure, from this report it appears that Congress was primarily concerned with codifying *Barrett*'s holding that state, as well as federal, offenses could qualify as "aggravated felonies"; the report does not speak directly to *Barrett*'s ***other*** holding – namely, that "drug trafficking crimes" must be federal felonies or their state-law analogues. *But see Palacios-Suarez*, 418 F.3d at 699 ("The language of the report clearly reveals that Congress embraced the BIA's 'hypothetical federal felony' approach with regard to the term 'aggravated felony.'"). Nevertheless, the report shows that Congress was aware of the *Barrett* decision, and – significantly – expressed no disapproval of that other holding. "It is [thus] clear that the approach of the Board in *Barrett* met with Congress's approval." *Ibarra-Galindo*, 206 F.3d at 1344 (Canby, J., dissenting).

Along these lines, it is also significant that despite the BIA's adherence to the Federal Felony Approach in its 1992 decision in *Davis*, 20 I. & N. Dec. at 542-44, and its

1995 decision in *L–G–*, 21 I. & N. Dec. at 94-96, and despite major overhauls of the INA in 1996,

> Congress made no changes to the aggravated felony provisions that disputed or called into question those rulings. It is an established principle of statutory construction that Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change. *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978). The presumption is particularly appropriate where [as in the 1996 immigration legislation] Congress exhibited both a detailed knowledge of the incorporated provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation. *Id.* at 581, 98 S. Ct. 866. Furthermore, Congress is not presumed to change well-established legal precedent by silence. *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613-14, 111 S. Ct. 1539, 113 L. Ed. 2d 675 (1991).

Gonzales-Gomez, 372 F. Supp. 2d at 1072. The fact that Congress specifically amended the INA to overrule certain BIA rulings, yet declined to amend the portion of the "aggravated felony" definition here at issue so as to overrule the BIA's rulings in *Davis* and *L–G–*,[16] is evidence that "Congress did not object to the BIA's reasoning in [these

[16] Indeed, the one change made to 8 U.S.C. § 1101(a)(43)(B) after 1990 actually cuts ***against*** the State Felony Approach. In 1994, Congress specifically amended § 1101(a)(43)(B) to refer more generally to "section 924(c)" rather than "section 924(c)(2)" as it had read before. *See supra* note 7. As discussed above, this amendment supports the Federal Felony Approach. *See id.* and accompanying text.

cases]." *Id.* at 1073 (citation omitted); *see also id.* at 1072-73; *Cazarez-Gutierrez*, 382 F.3d at 917 (drawing same conclusion); *Matter of Yanez-Garcia*, 23 I. & N. Dec. 390, 405-06, 2002 WL 993589 (BIA 2002) (Rosenberg, Board Member, concurring in part and dissenting in part) (same).

In sum, "the legislative history of § 1101(a)(43) confirms the interpretation that Congress did not intend for state felony convictions (not involving any element of drug trafficking) to qualify as an 'aggravated felony' under § 1101(a)(43)(B) if the offense would be punishable only as federal misdemeanor under the CSA." *Palacios-Suarez*, 418 F.3d at 700.

3. Conclusion.

The statutory and legislative history of the provisions here at issue makes clear that the Federal Felony Approach "is the proper interpretation of an 'aggravated felony' under the INA." *Id.* At a minimum, neither the text and structure of these provisions nor their history "plain[ly] indicat[es]," *Jerome*, 318 U.S. at 104, that Congress intended the application of § 1101(a)(43)(B) to vary depending upon how the particular State of conviction punished the conduct at issue. Under *Jerome* and its progeny, it must therefore be presumed that Congress intended the Federal Felony Approach rather than the State Felony Approach.

E. Even If the Text, Structure, and History of the Statutory Provisions at Issue Here Did Not Clearly Support the Federal Felony Approach, That Approach Would Nonetheless Be Required by Application of the Rule of Lenity.

As set forth above, the text, structure, and history of the statutory provisions at issue here clearly indicate that Congress intended to adopt the Federal Felony Approach rather than the State Felony Approach applied by the Fifth Circuit in this case. Whether or not one agrees with this position, however, one thing is certainly clear – the text, structure, and history of the statutes in question do ***not*** establish that the State Felony Approach is unambiguously correct. That being the case (and to paraphrase Justice Scalia), "[e]ven if the [Court] does not consider the issue to be as clear as [Mr. Toledo-Flores] do[es], [it] must at least acknowledge * * * that it is eminently debatable – and that is enough, under the rule of lenity, to require finding for [Mr. Toledo-Flores] here." *Smith v. United States*, 508 U.S. 223, 246 (1993) (Scalia, J., dissenting).

"In these circumstances – where text, structure, and history fail to establish that the Government's position is unambiguously correct – [this Court] appl[ies] the rule of lenity and resolve[s] the ambiguity in [the defendant's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994) (citing *United States v. Bass*, 404 U.S. 336, 347-49 (1971)); *see also Ladner v. United States*, 358 U.S. 169, 177 (1958). Therefore, should any doubt remain as to whether Congress intended to adopt the Federal Felony Approach, the rule of lenity nevertheless compels that conclusion. *See, e.g., Palacios-Suarez*, 418 F.3d at 702 (Nelson, J., concurring) (opining that, because relevant language could be read to support either approach, rule of lenity required

adoption of the Federal Felony Approach); *Ibarra-Galindo*, 206 F.3d at 1344-45 (Canby, J., dissenting) ("Even if the language and history of those statutes did not militate toward [adoption of the Federal Felony Approach], they would certainly give rise to uncertainty about the proper construction. In that event, we should follow the rule of lenity and adopt the construction that is most favorable to the defendant.") (footnote omitted); *Peralta-Espinoza*, 413 F. Supp. 2d at 980 ("Finally, to the extent there remained any doubt, the rule of lenity directed me to apply the [] [Federal] [F]elony [A]pproach.").[17]

F. The Federal Felony Approach Furthers the Well-Established Interest in Uniform Nationwide Application of Both Criminal Laws and Immigration Laws, and Also Avoids the Troubling Constitutional Questions that the State Felony Approach Raises.

Finally, the Federal Felony Approach comports with the policy of "desirability of uniformity in application" of federal criminal laws that underlies the *Jerome* presumption invoked here. *Jerome*, 318 U.S. at 104. Indeed, this Court has previously relied on that policy to reject an interpretation of a federal statute that would have made the applicability of a federal sentencing enhancement turn

[17] Adoption of the Federal Felony Approach is also compelled by the immigration counterpart to the rule of lenity, namely, "'the long-standing principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)); *see also, e.g.*, *Cazarez-Gutierrez*, 382 F.3d at 918 ("ambiguities in statutes are construed in favor of aliens in removal") (citing *Cardoza-Fonseca*, 480 U.S. at 449, and *INS v. Errico*, 385 U.S. 214, 225 (1966)).

on a State's characterization of a prior offense under that State's own law. *See Taylor*, 495 U.S. at 590-92. At issue in that case was whether "burglary" under the Armed Career Criminal Act (18 U.S.C. § 924(e)) included any offense labeled as "burglary" by the State of conviction. The Court noted that an affirmative answer to that question "would mean that a person convicted of unlawful possession of a firearm would, or would not, receive a sentence enhancement based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that conduct 'burglary.'" *Taylor*, 495 U.S. at 590-91. Relying on the presumption in favor of uniform application of federal laws, and against incorporation of disparate State laws, the Court instead answered that question in the negative and held that "'burglary' in § 924(e) must have some uniform definition independent of the labels employed by the various States' criminal codes." *Id.* at 592.

Congress itself has expressed the view that federal sentencing should uniformly punish those who are guilty of identical conduct. For example, Congress has mandated that, in sentencing federal defendants, federal courts should "consider * * * the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). And, indeed, "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct" was one of Congress's chief goals in enacting a system of Sentencing Guidelines. *See* 28 U.S.C. §§ 991(b)(1)(B) & 994(f); *see also United States v. Booker*, 543 U.S. 220, 253 (2005) ("Congress' basic goal in passing the Sentencing [Reform] Act was to move the sentencing system in the direction of increased uniformity.") (citing 28

U.S.C. §§ 991(b)(1)(B) and 994(f)) & *id.* at 246 (referring to "the increased uniformity of sentencing that Congress intended its Guidelines system to achieve"). The strong interest in the uniform application of federal criminal laws is best served by the application of the Federal Felony Approach.

This policy in favor of uniform national application of the criminal laws dovetails with the similar policy in favor of uniform national application of immigration law. *See, e.g.*, *Gerbier*, 280 F.3d at 311-12 (discussing policy in favor of uniform national application of immigration law and concluding that this policy supports adoption of the Federal Felony Approach); *Peralta-Espinoza*, 413 F. Supp. 2d at 979-80 (same); *Gonzales-Gomez*, 372 F. Supp. 2d at 1073-76 (same). And,

> [the Federal Felony Approach] is entirely consistent with and meaningfully effectuates uniformity. To hold otherwise would result in widely disparate consequences for similarly situated aliens based solely on differing state classifications of identical drug offenses. We do not believe that such a result was intended by Congress.

Gonzales-Gomez, 372 F. Supp. 2d at 1075 (quoting *Matter of K-V-D-*, 22 I. & N. Dec. 1163, 1174, 1999 WL 1186808 (BIA 1999); internal quotation marks omitted). Put another way, "widely disparate immigration consequences due to differences in how states punish drug offenses 'cannot be what Congress intended in establishing a "uniform" immigration law.'" *Cazarez-Gutierrez*, 382 F.3d at 918 (quoting *Gerbier*, 280 F.3d at 312).

Indeed, to the extent that "the policy favoring uniformity in the immigration context is rooted in the Constitution,"

Gerbier, 280 F.3d at 311 (citing U.S. CONST. art. I, § 8; further citation omitted), the disparate results occasioned by the State Felony Approach raise serious constitutional questions.[18] *See generally* Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. Rev. 1696 (1999). And, this Court has long held that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) (citation omitted). Thus, "'[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.'" *United States v. LaFranca*, 282 U.S. 568, 574 (1931) (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); other citations of authority omitted). *See also Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 628-29 (1993) (referring to this rule of statutory construction as a "hoary one" and collecting authorities). The Court can, and should, avoid these nettlesome constitutional questions by adopting the interpretation strongly suggested by the text, structure,

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[18] In addition to (at least arguably) impinging upon the requirements of the Naturalization Clause of the Constitution (U.S. CONST. art. I, § 8), the disparate results occasioned by the State Felony Approach also raise grave constitutional questions under the equal protection component of the Due Process Clause of the Fifth Amendment. *See, e.g.*, *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976) ("Fundamental fairness dictates that permanent residents who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.").

and history of the provisions at issue here, namely, the Federal Felony Approach.

G. Summary.

In summary, what this Court once said about another statute applies with equal force to 8 U.S.C. § 1101(a)(43)(B):

> Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no such patchwork plan for [regulating which persons were to be deemed removable (or punishable) by dint of prior narcotics convictions]. [Section 1101(a)(43)(B)] is federal legislation, administered by a national agency, intended to solve a national problem on a national scale. It is an Act, therefore, in reference to which it is not only proper, but necessary for [the Court] to assume "in the absence of a plain indication to the contrary, that Congress * * * is not making the application of the federal act dependent on state law." Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems.

NLRB v. Hearst Publications, Inc., 322 U.S. 111, 123 (1944) (citations omitted). At the very least, Congress gave no "plain indication," *Jerome*, 318 U.S. at 104, of its intent to make the "aggravated felony" definition in 8 U.S.C. § 1101(a)(43)(B) dependent upon the vagaries of state law (particularly whether the State at issue labels and punishes simple possession of a controlled substance as a

felony). Under *Jerome* and its progeny, it must therefore be presumed that Congress intended to adopt the Federal Felony Approach.

Even if this result were not compelled by statutory construction and the *Jerome* presumption, however, the same result would be compelled by the rule of lenity, as well as by the strong interest in uniform national application of federal criminal and immigration laws and the principle of constitutional avoidance. Because the Fifth Circuit erroneously applied the State Felony Approach in deciding Mr. Toledo-Flores's case, this Court should reverse the judgment of the Fifth Circuit.

CONCLUSION

The judgment of the United States Court of Appeals should be reversed.

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(1)

Supreme Court, U.S.
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MAR 10 2006
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NOS. 05-7496 and (05-7664)

IN THE SUPREME COURT OF THE UNITED STATES

CECILIO MENDOZA-TORRES, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

orig

REYMUNDO TOLEDO-FLORES,
Petitioner,

Toledo-Flores

v.

UNITED STATES OF AMERICA,
Respondent.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

As to all petitioners:

I. Has the Fifth Circuit erred in holding - in opposition to the Second, Third, Sixth, and Ninth Circuits - that a state felony conviction for simple possession of a controlled substance is a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) and hence an "aggravated felony," under 8 U.S.C. § 1101(a)(43)(B), even though the same crime is a misdemeanor under federal law?

As to the petitioners in No. 05-7496 only:

II. For purposes of the third prong of plain-error review under Fed. R. Crim. P. 52(b), is the plain error of treating the Federal Sentencing Guidelines as mandatory (in contravention of this Court's decision in United States v. Booker, 125 S. Ct. 738 (2005)) a ***structural*** error that necessarily affects a defendant's substantial rights?

(SUBSIDIARY QUESTION: Should this Court hold this case pending this Court's resolution of a similar question in Washington v. Recuenco, No. 05-83, cert. granted, 126 S. Ct. 478 (Oct. 17, 2005)?)

III. Even if this type of Booker error is not structural, has the Fifth Circuit nevertheless misapplied this Court's decision in United States v. Dominguez Benitez, 542 U.S. 74 (2004), by requiring more than a "reasonable probability" that this error affected a defendant's sentence?

IV. Should this Court grant certiorari to resolve the deep, three-way circuit split respecting the proper application of the plain-error rule to unpreserved Booker error?

V. Should this Court overrule its prior decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), and hold that, where the fact of a prior conviction raises the applicable statutory maximum, the Constitution requires that such prior conviction be alleged in the indictment (in federal prosecutions) and proved to a jury beyond a reasonable doubt?

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PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES

Pursuant to Supreme Court Rule 15.6, petitioners Cecilio Mendoza-Torres, et al., in No. 05-7496, and petitioner Reymundo Toledo-Flores in No. 05-7664, hereby file the following joint Reply to the Brief for the United States (hereafter "U.S. Br.").[1]

I.

In its brief, the government notes that, in the case of Lopez v. Gonzales, No. 05-547, it has "agreed with the petitioner in that case that the Court should grant certiorari to decide whether the commission of a controlled substance offense that is a felony under state law, but that is generally punishable under the Controlled Substances Act only as a misdemeanor, constitutes an 'aggravated felony,' within the meaning of 8 U.S.C. § 1101(a)(43)." U.S. Br. 7-8. The government suggests that, in light of the position it has taken in Lopez v. Gonzales, "the Court may wish to hold the petition in No. 05-7664 [i.e., that of petitioner Toledo-Flores] and the petition in No. 05-7496, with respect to the first question presented only and with respect to petitioners Mendoza-Torres, S[au]zo-Izaguirre, Alejo-Agramon, Eguia-Hernandez, Armendariz-Chavez, Palencia-Contreras, and Vences only, pending the Court's disposition of the petition for a writ of certiorari in Lopez v. Gonzales, No. 05-547." U.S. Br. 8.

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[1] Petitioners file jointly because the government filed a single consolidated response to both of these petitions.

The government argues, however, that "[t]he petition in No. 05-7496 should be denied with respect to . . . petitioners[ ] Colatos-Rivas, Guardado-Ortega, Loredo-Pecina, and Ramirez-Maldonado." U.S. Br. 5. The government argues that, because each of these four petitioners has discharged his prison sentence and has been deported from the United States, their prospects of relief from prevailing on this claim, which implicates only their criminal sentences, "are too speculative to justify an exercise of this Court's certiorari jurisdiction and may be too speculative to avoid mootness." U.S. Br. 7; see also U.S. Br. 5-7.

The government is correct that this Court should, at a minimum, hold the petitions in No. 05-7664 (i.e., that of petitioner Toledo-Flores) and the petition in No. 05-7496, at least with respect to petitioners Mendoza-Torres, Sauzo-Izaguirre, Alejo-Agramon, Eguia-Hernandez, Armendariz-Chavez, Palencia-Contreras, and Vences, pending the Court's disposition of the petition for a writ of certiorari in Lopez v. Gonzales, No. 05-547. The question of statutory interpretation presented in Lopez is precisely the same as that presented in these cases, and the fact that the question arises in a criminal law context in these cases, as opposed to the immigration law context in Lopez, should make no difference as far as the resolution of that question. Cf. Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) (declining to interpret 18 U.S.C. § 16 differently in the immigration context than in the criminal law context "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or

noncriminal context . . .").

The government is ***not*** correct, however, with respect to its proposed disposition of the petition in No. 05-7496 as to petitioners Colatos-Rivas, Guardado-Ortega, Loredo-Pecina, and Ramirez-Maldonado. At the outset, the government makes a factual misstatement when it asserts that "each of those petitioners has completed his sentence . . . ." U.S. Br. 5. To be sure, each of these petitioners has completed the ***imprisonment*** component of his sentence; but each of these petitioners is still subject to the ***supervised release*** component of his sentence.[2] See, e.g., United States v. Gonzalez, 250 F.3d 923, 928 (5th Cir. 2001) ("Supervised release, while a form of post-imprisonment supervision, is still considered to be a component of the defendant's total sentence.") (citations omitted); see also 18 U.S.C. § 3583(a) ("The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include ***as a part of the sentence*** a requirement that the defendant be placed on a term of supervised release after imprisonment . . ."") (emphasis added).

The fact that these petitioners are still subject to the supervised release component of their sentences prevents mootness, and gives them a sufficiently concrete stake in the disposition of the question presented. First, especially with the increased sentencing discretion enjoyed by federal district courts in the

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[2] The supervised release terms were not extinguished by the defendants' removal from the United States. See, e.g., United States v. Brown, 54 F.3d 234, 238-39 (5th Cir. 1995).

wake of United States v. Booker, 543 U.S. 220 (2005), the sentencing courts in these cases could, on remand, impose a reduced term of supervised release (or even eliminate the term of supervised release altogether, since no minimum term upon resentencing is required by the statute of conviction in these cases.) Furthermore, a favorable disposition of this question could potentially result in a Guidelines sentencing range where a prison sentence of one year or less could be imposed - in which case even the Guidelines do not require ***any*** supervised release to be imposed. See USSG § 5D1.1(a) (supervised release term required only "when a sentence of imprisonment of more than one year is imposed, or when required by statute").

Finally, while excessive imprisonment erroneously served is not ***automatically*** subtracted from the term of supervised release upon remand, see United States v. Johnson, 529 U.S. 53, 54 and 57-60 (2000); United States v. Jeanes, 150 F.3d 483, 485 (5th Cir. 1998), such wrongful or excessive imprisonment is a factor that district courts may permissibly consider in setting the length or conditions of supervised release on remand. Cf. Johnson, 529 U.S. at 60 (noting that wrongful incarceration may be equitable consideration militating in favor of modification or early termination of supervised release term); Jeanes, 150 F.3d at 485 (same). For all these reasons, every circuit to have addressed the issue has held that the possibility of a reduced or eliminated term of supervised release renders an appeal of a Guideline application non-moot, even though the defendant may already have served the

prison sentence corresponding to that application. See, e.g., United States v. Castro-Rocha, 323 F.3d 846, 847-48 n.1 (10th Cir. 2003) (so holding and collecting other cases so holding).[3] Consequently, even those petitioners who have already served their prison sentences still possess a sufficiently concrete stake in the resolution of the question presented so as to justify exercise of this Court's certiorari jurisdiction.[4]

II.

In sum, this Court should, at a minimum, hold ***both*** of these petitions, as to ***all*** petitioners, pending the disposition of the

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[3] Coincidentally, Castro-Rocha is very similar to the instant case. In that case, the defendant, prosecuted for illegal reentry after deportation under 8 U.S.C. § 1326, received a sentencing enhancement on the ground that his Texas felony conviction for simple possession of a controlled substance was an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B) (as incorporated by reference in USSG § 2L1.2). Before his appeal to the United States Court of Appeals for the Tenth Circuit was decided, however, the defendant completed his prison sentence (and presumably was removed from the United States). The Tenth Circuit rejected the government's assertion that the appeal was thereby rendered moot, for the reasons urged here. See Castro-Rocha, 323 F.3d at 847-48 n.1.

[4] Additionally, by dint of their prior simple-possession convictions' being characterized as "aggravated felonies," all of the petitioners in No.05-7496 were convicted of the more serious offense punished in 8 U.S.C. § 1326(b)(2) by up to twenty years' imprisonment, rather than the lesser offense punished in 8 U.S.C. § 1326(b)(1) by up to ten years' imprisonment. This "heightened stigma associated with an offense the legislature has selected as worthy of greater punishment," Apprendi v. New Jersey, 530 U.S. 466, 495 (2000), is a further continuing consequence of the error alleged here, and hence a further reason for this Court to exercise its certiorari jurisdiction over ***all*** of the petitioners here. See also id. at 484 (where defendant faces a greater potential maximum sentence, "the stigma attaching to the offense [is] heightened").

petition for writ of certiorari in Lopez v. Gonzalez, No. 05-547; and, if certiorari is granted in Lopez, then further hold these petitions (again as to all petitioners) pending a decision in Lopez. As discussed above, even though the statutory question presented in Lopez arises in the immigration context, the resolution of that question in Lopez should apply with equal force to criminal cases like those presented by the petitions here.

If, however, this Court is inclined to grant certiorari on this issue in a criminal case for full briefing and argument in tandem with the immigration case presented in Lopez, we recommend that this Court grant certiorari (1) as to petitioner Mendoza-Torres in No. 05-7496; and/or (2) as to petitioner Toledo-Flores in No. 05-7664. Each of these cases presents an excellent vehicle for deciding this issue, inasmuch as the issue was in each case preserved for appellate review and inasmuch as, in each of these cases, the petitioner received the harsher "aggravated felony" enhancement based upon a conviction for simple possession of a tiny, personal-use amount of cocaine.[5] If the Court believes that plenary consideration of a criminal case would enhance its consideration of the question presented in Lopez, then petitioners pray that the Court consider granting certiorari as to petitioner Mendoza-Torres and/or petitioner Toledo-Flores for full briefing and argument in tandem with Lopez.

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[5] The information available to undersigned counsel indicates that Mr. Mendoza-Torres's conviction was for 0.2 grams of powder cocaine, and that Mr. Toledo-Flores's conviction was for 0.16 grams of cocaine.

CONCLUSION

For the foregoing reasons, as well as those set forth in the original petitions for writ of certiorari, the above-captioned petitioners pray that this Court grant certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in their cases.

Date:
March 10, 2006

Respectfully submitted,

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CASE NO. 05-8820

ORIGINAL

IN THE SUPREME COURT
OF THE UNITED STATES

GARY LAWRENCE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

Supreme Court, U.S.
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REQUEST FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Mr. Lawrence asks this Court to permit him to proceed *in forma pauperis* pursuant to Rule 39 of the Rules of this Court.

Leave for Mr. Lawrence, a death row inmate, to proceed *in forma pauperis* has been granted by the United States District Court for the Northern District of Florida as well as the United States Court of Appeals for the Eleventh Circuit under the Criminal Justice Act, Title 18 § 3006A. Thus, the Rule permits his application to this Court to be presented without benefit of affidavit or declaration.

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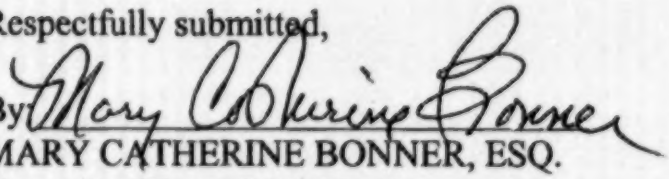
WHEREFORE, Mr. Lawrence seeks leave to proceed *in forma pauperis* before this Court.

Respectfully submitted,

By 

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Nos. 05-547 and 05-7664

IN THE

Supreme Court of the United States

JOSE ANTONIO LOPEZ,
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REYMUNDO TOLEDO-FLORES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER JOSE ANTONIO LOPEZ

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8 U.S.C. § 1101(a)(48).....15

8 U.S.C. § 1101(f)(8) 8, 14

8 U.S.C. § 1158(b)(2)(B) 14

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8 U.S.C. § 1229b(a) 14

8 U.S.C. § 1231(b)(3)(B) 14

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Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C,, 110 Stat. 3009-546 12-13

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Tenn. Crim. Code § 39-17-418.....16

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142 Cong. Rec. S12294-01 (Oct. 3, 1996).....13

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MISCELLANEOUS

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ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons (3d ed. 2004)

19-1.2 .....3, 15, 23, 27

19-2.2 .....3, 15, 23

19-2.4 23

19-2.5 23

ABA Criminal Justice Section, Pleas of Guilty (3d ed. 1999)

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ABA Criminal Justice Section, Prosecution Function and Defense Function (3d ed. 1993)

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3-3.9(b)(iii) 19

ABA Criminal Justice Section & Commission on Immigration, Report 300 to the House of Delegates (Feb. 2006), http://www.abanet.org/crimjust/policy/my06300.pdf.....3, 4, 15

Iris E. Bennett, *The Unconstitutionality of Nonuniform Immigration Consequences of 'Aggravated Felony' Convictions*, 74 N.Y.U. L. Rev. 1696 (1999).....30

Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251 (1974).....2

Compact Oxford English Dictionary (2d ed. 1999).....9, 11

The Federalist No. 32 (Alexander Hamilton) (Clinton Rossiter ed., 1961).....27

Mass. Dep't of Corr., New Court Commitments to Massachusetts County Correctional Facilities During 2004 (Nov. 2005), http://www.mass.gov/Eeops/docs/doc/research_reports/2004cty.pdf 16

Message from the President, Robert M.A. Johnson, National District Attorneys Ass'n, The Prosecutor, *Collateral Consequences*, May/June 2001, http://www.ndaa-apri.org/ndaa/about/president_message_may_june-2001.html.....19, 23

Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 Cornell L. Rev. 1411 (2005).....20

Stephanie Morin, *New York State Defenders Assoc., Analysis of New York State Division of Criminal Justice Services Misdemeanor Drug Offense Statistics for the Years 1995 Through 2004* (Oct. 15, 2005), http://www.nysda.org/idp/docs/05_Analysis.pdf.....16

NDAA, National Prosecution Standards (2d ed. 1991)

42.3 19

New York State Dispositions - 1995 through 2004, http://www.nysda.org/idp/docs/NYS.Conviction.Sent.and.Len.pdf 16

New York State Div. of Crim. Just. Servs., Adult Arrests: N.Y. State by County and Region 1994, http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/year1994.htm 17

Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 Ark. L. Rev. 269 (1997) 20

Norton Tooby & Katherine A. Brady, *Criminal Defense of Immigrants* (3d ed. 2003) 21

Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945 (1997) 25

Daniel Wise, *Caseloads Skyrocket in Brooklyn Courts: Upswing Linked to NYPD Narcotics Investigation*, N.Y. L.J., May 22, 2000 17

Jon Wool & Don Stemen, *Changing Fortunes or Changing Attitudes? Sentencing and Corrections Reforms in 2003*, 16 Federal Sentencing Reporter (April 2004), http://www.vera.org/publication_pdf/226_431.pdf 16

INTEREST OF *AMICUS*[1]

The American Bar Association ("ABA") is the voluntary, national membership organization of the legal profession. Its more than 407,000 members, from every state and territory and the District of Columbia, include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students, and non-lawyer associates in allied fields.[2] Since its inception, the ABA has actively promoted improving the administration of justice. The ABA has also long been committed to protecting the constitutional and statutory rights of non-citizens. The ABA respectfully submits this brief *amicus curiae* because the question presented by this case implicates matters addressed by the ABA Standards for Criminal Justice and other policies adopted by its House of Delegates. Resolution of this case, furthermore, has implications for the administration of criminal justice and for the uniform application of immigration law.

Over more than thirty years, the Standards have been developed, refined, and approved by ABA task forces made up of prosecutors, judges, defense lawyers, academics, and others, and by the ABA's wider and diverse membership. An experienced group of prosecutors, defenders, and judges has agreed upon this considered collection of "best

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

practices."[3] This Court has relied upon the Standards as a guide to criminal justice administration. *See, e.g., Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2805-06 (2005); *Rompilla v. Beard*, 125 S. Ct. 2456, 2465-66 (2005); *INS v. St. Cyr*, 533 U.S. 289, 322 n.48 (2001). Policy resolutions of the House of Delegates, a broadly representative forum for the legal profession, also represent a consensus of the ABA's diverse membership.

Among the ABA policies implicated by this case are, most directly: the Standards on Collateral Sanctions; policies concerning relief from deportation as a collateral consequence of a criminal conviction; and a recently adopted policy concerning the scope of the "aggravated felony" ground for deportation. Other relevant ABA policies are noted in the body of this brief.

The Standards on Collateral Sanctions recognize that the collateral consequences of a criminal conviction should be commensurate with the gravity of the offense. They further recognize that a relief mechanism should be available unless imposition of the collateral consequences at issue is warranted in all circumstances. These Standards state in relevant part:

> [T]he objectives of this chapter are to . . . limit collateral sanctions imposed upon conviction to those that are specifically warranted by the conduct constituting a particular offense . . . prohibit certain collateral sanctions that, without justification, infringe on fundamental rights, or frustrate a convicted person's chances of successfully reentering society . .

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[3] Chief Justice Warren Burger described the Criminal Justice Standards project as "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history." Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251, 251 (1974).

> . and . . . provide a judicial or administrative mechanism for obtaining relief from collateral sanctions.

ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons, Standard 19-1.2 (3d ed. 2004).

> The legislature should not impose a collateral sanction on a person convicted of an offense unless it determines that the conduct constituting that particular offense provides so substantial a basis for imposing the sanction that the legislature cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified.

Id. Standard 19-2.2.

In addition, for over thirty years, ABA policy has advocated that discretionary relief from deportation be available to non-citizens convicted of crimes based on equities such as family ties and length of residence in the United States. *See* 100 ABA Ann. Rep. 642, 663 (1975); *see also* ABA Criminal Justice Section & Commission on Immigration, Report 300 to the House of Delegates, at 1 (Feb. 2006), http://www.abanet.org/crimjust/policy/my06300.pdf ("ABA Report 300") (urging restoration of discretion to immigration judges to grant deportation relief).

And in February 2006, the ABA House of Delegates adopted a resolution urging that low-level offenses not be deemed "aggravated felonies" (which carry the collateral consequence of mandatory deportation):

> [T]he American Bar Association urges federal immigration authorities to avoid interpretations of the federal immigration laws that extend the reach of the 'aggravated felony' mandatory deportation ground to . . . low-level state offenses that either are

misdemeanors under state law or would be misdemeanors under federal law.

ABA Report 300 at 1.

SUMMARY OF ARGUMENT

The question presented in this case is whether a drug possession offense that is a felony under state law, but would be a misdemeanor under federal law, is an "illicit trafficking" "aggravated felony" within the meaning of the Immigration and Nationality Act (INA).[4] Resolution of this question also has implications for whether certain possession offenses that are not felonies under state law may nevertheless be deemed "illicit trafficking" "aggravated felonies." This *amicus curiae* brief offers an approach to the statute that is coherent as to both types of offenses.

Some courts have deemed offenses such as Petitioner's, that do not involve trafficking and would be misdemeanors under federal law, to be illicit trafficking aggravated felonies because the offenses are state-law felonies. Other courts have deemed offenses that do not involve trafficking and are second or subsequent state-law misdemeanors to be illicit trafficking aggravated felonies, because repeat misdemeanors may be prosecuted as federal-law felonies. Properly read, the illicit trafficking aggravated felony provision does not support including either type of offense.

The statutory text, structure, and history dictate reading the illicit trafficking aggravated felony provision as limited to felonies actually involving trafficking. Simple possession does not constitute "illegal trafficking." Also, in order to be

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[4] The ABA submits this brief in support of Petitioner Jose Antonio Lopez ("Lopez"), but arguments relevant to Petitioner Reymundo Toledo-Flores ("Toledo-Flores") also support reversal in that case. *See Leocal v. Ashcroft*, 543 U.S. 371, 380 (2004) ("[W]e must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context.").

an "aggravated felony," a state offense must as a threshold matter be a felony under state law. *See infra* Section I.

Imposing mandatory deportation and other harsh immigration consequences for low-level possession offenses results in a drastic disparity between the direct and collateral consequences of such convictions. This leads not only to individual injustices but also to unanticipated adverse consequences for the integrity and fair and regular operation of the criminal justice system. These concerns support application of the rule of lenity, which requires that any lingering ambiguities in the statute be construed against deportation. These same concerns also support application of the rule of constitutional avoidance, because reading the illicit trafficking aggravated felony provision to apply to low-level possession offenses may raise problems under the void-for-vagueness due process doctrine. In light of the disparity between direct and collateral consequences, a non-citizen may lack sufficiently definite warning that a low-level simple possession offense could result in extreme immigration consequences. *See infra* Section II.

The illicit trafficking aggravated felony provision moreover should be construed so as to avoid problems of non-uniformity in immigration law. Congress is presumed to legislate with uniformity in mind. Immigration law uniformity is also grounded in the "uniform Rule of Naturalization" clause of the U.S. Constitution. Applying the illicit trafficking aggravated felony provision to state-law possession offenses that are misdemeanors under either federal or state law raises non-uniformity problems. Immigration consequences may turn on the happenstance of which state law a non-citizen was convicted under. The doctrine of constitutional avoidance counsels that the statute be construed to avoid such problems. *See infra* Section III.

The ABA therefore supports Petitioner's argument that a simple possession offense, even if a state-law felony, cannot

be an illicit trafficking aggravated felony if it would be a federal misdemeanor. However, a state's classification of a possession offense as a misdemeanor may not be disregarded simply because the offense might be prosecuted as a federal felony. Deeming either type of offense to be an illicit trafficking aggravated felony: (1) cannot be reconciled with the aggravated felony definition's text; (2) adversely affects the administration of criminal justice and the uniformity of immigration law; and (3) is contrary to the rules of lenity and constitutional avoidance. We submit that Congress never intended such a result. The illicit trafficking aggravated felony provision should be construed to include only offenses that involve trafficking and that are not misdemeanors under either federal or state law.[5]

ARGUMENT

I. THE STATUTORY TEXT, STRUCTURE, AND HISTORY DICTATE A NARROW READING OF THE ILLICIT TRAFFICKING AGGRAVATED FELONY PROVISION LIMITED TO FELONIES THAT INVOLVE TRAFFICKING.

The INA provides that "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) . . .)" constitutes an aggravated felony. 8 U.S.C. § 1101(a)(43)(B). Section 924(c), Title 18, in turn defines a "drug trafficking crime" as "any felony punishable under the Controlled Substances Act" and two other federal criminal statutes. 18 U.S.C. § 924(c). The INA defines neither "felony" nor "trafficking" as those terms relate to the "illicit trafficking" "aggravated felony" provision. The Board of Immigration Appeals (BIA) and federal courts have failed to develop a consistent and coherent view of how this provision applies to state simple possession offenses.

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[5] Because all trafficking is a felony under federal law, state-law felony trafficking offenses are necessarily federal felonies. *See* 21 U.S.C. § 841.

Initially, the BIA held that by including offenses covered under the federal criminal code's definition of "drug trafficking crime," the INA includes a state possession offense analogous to a federal felony, even if it is not a state-law felony. *See In re K-V-D*, 22 I. & N. Dec. 1163 (B.I.A. 1999); *In re L-G*, 21 I. & N. Dec. 89 (B.I.A. 1995); *In re Davis*, 20 I. & N. Dec. 536 (B.I.A. 1992).[6] This is the "hypothetical federal felony" approach. The BIA then changed course, holding that it would follow the relevant circuit's rule or, if there was no circuit authority, the majority rule. The BIA viewed the majority rule as being that the state designation controls: if a drug offense is a state-law felony it is an aggravated felony, regardless of whether it involves trafficking. *See In re Yanez-Garcia*, 23 I. & N. Dec. 390 (B.I.A. 2002); *In re Santos-Lopez*, 23 I. & N. Dec. 419 (B.I.A. 2002).

Some federal appellate decisions follow the hypothetical federal felony approach. *See, e.g., Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002). Others apply the state law designation. *See, e.g., United States v. Restrepo-Aguilar*, 74 F.3d 361 (1st Cir. 1996). And one appeals court has taken an either/or approach, holding that an offense is an aggravated felony if it would be a felony under either state or federal law. *See United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1142 (2006).

Thus, depending on the jurisdiction, a non-citizen convicted of simple possession may be deemed to have committed an aggravated felony on the ground that (a) the offense is analogous to a federal drug felony; (b) the offense

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[6] The illicit trafficking aggravated felony provision was enacted in 1990. *See* Immigration Act of 1990 § 501, Pub. L. No. 101-649, 104 Stat. 4978, 5048, as corrected by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 § 306(a)(1), Pub. L. No. 102-232, 105 Stat. 1733, 1751.

is classified as a state-law felony; or (c) either one of these circumstances exists.

Yet a coherent approach faithful to the statutory text and applicable to a range of factual contexts is possible. That textually faithful approach encompasses but goes beyond the hypothetical federal felony approach. It requires including as illicit trafficking aggravated felonies only those offenses that actually involve trafficking and that are not misdemeanors under either federal or state law. As discussed in Section I, the statutory text, structure, and legislative history dictate this reading. And as discussed in Sections II and III, the problems caused by a broader reading for the administration of criminal justice and for uniformity in the immigration laws further support the proposed statutory construction. Indeed, neither the rule of lenity nor the principle of constitutional avoidance permit reading the illicit trafficking aggravated felony provision to include low-level possession-only crimes.

A. Simple Possession, Whether a Felony Under State Law or a Hypothetical Felony Under Federal Law, Does Not Constitute "Illicit Trafficking."

The statutory language compels the conclusion that simple possession offenses are not aggravated felonies because "illicit trafficking" does not include mere possession of a controlled substance. In *Leocal*, this Court, construing another aggravated felony provision, unanimously reaffirmed that statutory terms should be given their "ordinary or natural meaning." 543 U.S. at 9 (internal quotation marks and citation omitted).[7]

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[7] Thus, driving under the influence of alcohol and causing serious bodily injury is not a "crime of violence" aggravated felony, 8 U.S.C. § 1101(a)(43)(F), because "[t]he ordinary meaning of this term [crime of violence] . . . cannot be said naturally to include DUI offenses," *Leocal*, 543 U.S. at 11. This analysis reflects the long-established principle that the inquiry into statutory meaning necessarily begins with the plain language. *See, e.g., Bailey v. United States*, 516 U.S. 137, 144 (1995).

Petitioner correctly explains that the natural reading of the statute is that a simple possession offense that is a state-law felony but a federal-law misdemeanor is not an illicit trafficking aggravated felony. *See* Lopez Br. I.A. *Leocal*, however, requires a further conclusion: because simple possession does not constitute trafficking, no simple possession offense, including one hypothetically punishable as a federal felony, constitutes an illicit trafficking aggravated felony.

The argument made for deeming state-law felony possession offenses to be aggravated felonies is that the INA refers to "drug trafficking (as defined in Section 924(c) . . .)"; Section 924(c) refers to "any felony punishable under the Controlled Substances Act"; and, allegedly, "any felony" includes any state-law felony. *See Lopez v. Gonzalez*, 417 F.3d 934 (8th Cir. 2005). The argument made for considering second or subsequent state-law misdemeanors is that, under federal criminal law, a second possession offense under certain circumstances may be prosecuted as a felony. *See* 21 U.S.C. § 844; *see also Sanchez-Villalobos*, 412 F.3d at 577. This is said to render such a misdemeanor offense a Section 924(c) "drug trafficking crime," and therefore an illicit trafficking aggravated felony. *Id.*

But the subcategory of Section 924(c) "drug trafficking crime[s]" "includ[ed]" in the principal category of "illicit trafficking" "aggravated felonies" may not swallow the principal "illicit trafficking" category. *See Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("[T]he term 'including' . . . connotes simply an illustrative application of the general principle."). And the "ordinary or natural" meaning of "illicit trafficking" requires more than mere possession. *See* Compact Oxford English Dictionary 2092 (2d ed. 1999) (defining "traffic" as "[t]he buying or selling or exchange of goods for profit; bargaining; trade"); *cf. Salinas v. United States*, 126 S. Ct. 1675, 1675 (2006)

(per curiam) (holding that simple possession does not constitute a "controlled substance offense" under the Sentencing Guidelines because the relevant Guideline pertains to "possession . . . with intent to manufacture, import, export, distribute, or dispense" (internal quotation marks and citation omitted)).

Thus, the natural reading of the aggravated felony provision is that it creates a single "illicit trafficking" category that "includ[es]" as a subset those felony violations of three designated federal statutes that themselves include a "trafficking element." In other words, even if all offenses punishable as felonies under the three statutes enumerated in Section 924(c) constitute Section 924(c) "drug trafficking crimes," it does not follow that all "drug trafficking crimes," including misdemeanor crimes hypothetically punishable as federal felonies, constitute "illicit trafficking" under 8 U.S.C. § 1101(a)(43)(B). Therefore, simple possession offenses, irrespective of their misdemeanor or felony classification, do not constitute illicit trafficking aggravated felonies.

B. To be an "Aggravated Felony," a State Offense Must Be a Felony Under State Law.

The ABA agrees with Petitioner that a state felony possession offense that would be a misdemeanor under federal law is not an "illicit trafficking" "aggravated felony." This conclusion should not be taken, however, to suggest that because a second or subsequent state-law misdemeanor possession offense might be prosecuted as a felony under federal law, the offense constitutes an aggravated felony.[8]

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[8] Petitioner does not address this issue because his offense is a state felony. The Court need not reach this question here. However, in other cases, it has been argued or courts have found that state misdemeanor drug possession offenses are aggravated felonies under the hypothetical federal felony approach. *See, e.g., Sanchez-Villalobos*, 412 F.3d 572. This is not a proper application of the hypothetical federal felony

The natural meaning of the term "aggravated" modifying "felony" is that "aggravated felony" includes only particularly serious felonies. *See* Compact Oxford English Dictionary 28 (defining "aggravated" as "Increased, magnified; Increased in gravity or seriousness: made worse or more grievous; intensified in evil character"); *see also Leocal*, 543 U.S. at 9.[9] The statutory structure and history further show that "aggravated felonies" do not include non-felony offenses.

Other INA amendments enacted simultaneously with the "aggravated felony" provision reflect that Congress intended that this provision include only felonies.[10] For example, Congress revised the immigration detention provisions to require detention of "any alien convicted of an aggravated felony," and directed that "the Attorney General shall not

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approach, *see infra* p.29; *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001), and is incorrect for the other reasons set forth in this brief.

[9] As one circuit judge observed:

> Common sense and standard English grammar dictate that when an adjective – such as "aggravated" – modifies a noun – such as "felony" – the combination of the terms delineates a subset of the noun. One would never suggest, for example, that by adding the adjective "blue" to the noun "car," one could be attempting to define items that are not, in the first instance, cars. In other words, based on the plain meaning of the terms "aggravated" and "felony," we should presume that the specifics that follow in the definition of "aggravated felony" under INA § 101(a)(43) serve to elucidate what makes these particular felonies "aggravated"; we certainly should not presume that those specifics would include offenses that are not felonies at all.

United States v. Pacheco, 225 F.3d 148, 157 (2d Cir. 2000) (Straub, J, dissenting).

[10] *See* Anti-Drug Abuse Act of 1988 ("ADAA"), Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469; *see generally Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) ("[I]n expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." (internal quotation marks and citation omitted)).

release such felon from custody."[11] ADAA § 7343(a)(4), 102 Stat. at 4470. Congress also amended the criminal provision for illegal reentry after deportation to provide for different sentence enhancements depending on whether the prior deportation was subsequent to an aggravated felony conviction or, instead, to conviction for "a felony (other than an aggravated felony)." *Id.* § 7345(a)(2), 102 Stat. at 4471.[12] Congress later added an enhancement if the prior deportation followed a conviction for "three or more misdemeanors." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130001(b), 108 Stat. 1796, 2023. Thus, Congress distinguished between misdemeanors and aggravated felonies within the same statutory provision.[13] The legislative history of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which amended the "aggravated felony" definition, further supports the distinction. *See* Pub. L. No. 104-208, Div. C, § 321, 110

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[11] *See also id.* § 7347(a), 102 Stat. at 4471-72 ("With respect to an alien convicted of an aggravated felony who is taken into custody by the Attorney General . . . the Attorney General shall, to the maximum extent practicable, detain any such felon at a facility at which other such aliens are detained.").

[12] In 1990 and 1991 amendments, Congress also clarified that state drug offenses may be deemed aggravated felonies and barred waiver of exclusion for aggravated felons, *see* Immigration Act of 1990, Pub. L. No. 101-649, §§ 501(a)(3), 511(a), 104 Stat. 4978, 5048, 5052, if the individual had served "for such felony or felonies" a five-year or more term of imprisonment, Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(10), 105 Stat. 1733, 1751.

[13] Congress saw no need to add a parenthetical "(other than an aggravated felony)" to the "three or more misdemeanor" provision, plainly contemplating overlap between the terms "felony" and "aggravated felony" but not between "misdemeanor" and "aggravated felony." *See Leocal*, 543 U.S. at 12 (holding that the fact that the statute separately listed and distinguished between "crime of violence" and "DUI" for purposes other than the aggravated felony definition, "reinforc[ed]" the conclusion that a DUI is not a crime of violence aggravated felony).

Stat. 3009-546, 3009-627 to -628. Proponents of the IIRIRA amendments referred to the crimes and individuals they wished included as "felonious acts," "convicted felons," and "serious felonies," in addition to "aggravated felonies" and "aggravated felons." 142 Cong. Rec. S4592-01, S4598-S4600 (May 2, 1996).[14]

Thus, the statutory structure and legislative history reinforce that Congress knew how to, and did, distinguish between felons and misdemeanants. It intended that the aggravated felony provision apply only to felony offenses.

II. SUBJECTING NON-CITIZENS TO MANDATORY DEPORTATION FOR LOW-LEVEL SIMPLE POSSESSION OFFENSES ADVERSELY AFFECTS THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM.

Any drug offense, including simple possession (other than a single offense of possession for personal use of 30 grams or less of marijuana), renders a non-citizen deportable. 8 U.S.C. § 1227(a)(2)(B)(i). In many cases the United States appropriately removes non-citizens for committing crimes, including drug offenses. But Petitioner and other non-citizens convicted of low-level possession offenses have not merely been deemed "deportable" (meaning there would still be the possibility of discretionary relief). Rather, they are subject to mandatory deportation and other extreme immigration consequences as "aggravated felons."

Imposing such harsh immigration consequences for low-level offenses has unanticipated adverse consequences for the

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[14] Also, in a colloquy about IIRIRA's restoration of eligibility for deportation relief to "aliens who have not committed aggravated felonies," Senator Hatch explained that this was in response to earlier restrictions barring relief "for virtually any alien who had been convicted of any crime, including some misdemeanors." 142 Cong. Rec. S12294-01, S12295 (Oct. 3, 1996).

justice system. Not only does it result in injustices for individual defendants, but it negatively affects the role of prosecutors, defense counsel, and judges. The statutory provision at issue should be construed, under the rules of lenity and constitutional avoidance, to maintain and promote the fairness and integrity of the justice system.

A. The Severity of the Collateral Consequences of Aggravated Felony Convictions is Disproportionate to the Criminal Justice System's Treatment of Low-Level Possession Offenses.

The immigration consequences of an aggravated felony conviction are myriad and severe. Such a conviction bars discretionary relief from deportation, known as cancellation of removal.[15] *See* 8 U.S.C. § 1229b(a). A non-citizen convicted of such an offense may not request that an immigration judge consider the offense's actual severity, the individual's equities, and the interests of the United States.[16] Aggravated felony convictions also bar asylum, *id.* § 1158(b)(2)(B), and may preclude withholding of removal, another type of deportation relief, *id.* § 1231(b)(3)(B).[17]

Commission of any crime is a serious matter, but not all crimes are of equal gravity. ABA policy recognizes that convictions for misdemeanors under either federal or state law should not result in mandatory, extreme immigration

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[15] Non-citizens have long been deportable for some crimes, but discretionary relief existed. *See St. Cyr*, 533 U.S. at 294-96. IIRIRA eliminated such relief for "aggravated felons."

[16] In a cancellation of removal hearing, the judge may waive deportation based on factors such as the non-citizen's family ties in the U.S., residence of long duration in this country, hardship to the family, service in the U.S. Armed Forces, history of steady employment, existence of property or business ties, proof of rehabilitation, and other equities such as value and service to the community. *See, e.g., In re C-V-T*, 22 I. & N. Dec. 7 (B.I.A. 1998).

[17] A post-1990 aggravated felony also permanently bars naturalization. *See id.* §§ 1101(f)(8), 1427(a)(3).

consequences. *See* ABA Report 300 at 1. ABA policies also recognize that collateral consequences should correspond to the seriousness of the conduct involved. *See* ABA Criminal Justice Standards 19-1.2 and 19-2.2. Broadly construing the "illicit trafficking" "aggravated felony" provision to include offenses that do not involve trafficking, and that would be misdemeanors under either federal or state law, creates stark disproportionality between the offense and its collateral consequences.[18] As Petitioner's case illustrates, under the broad reading of the illicit trafficking aggravated felony provision currently being applied in immigration proceedings, a single simple possession offense triggers mandatory deportation. It is plainly legitimate for a state, such as South Dakota, to treat simple possession as a felony to effectuate local criminal justice policies. *See Heath v. Alabama*, 474 U.S. 82, 93 (1985). But states do not legislate criminal law with collateral immigration consequences in mind. Even if the state classifies an offense as a felony, traditional criminal justice goals are typically served by punishing the offender sufficiently to achieve retribution and deterrence, while at the same time permitting rehabilitation and reassimilation into society. Permanently and automatically banishing an individual from the country may go well beyond those goals.

The disproportionality that results from imposing mandatory deportation is even more apparent when

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[18] Indeed, the term "conviction" as used in the INA includes dispositions for which the sentence was suspended, or for which the penalty consisted of participation in rehabilitative programs, community service, or fines. 8 U.S.C. § 1101(a)(48). Withheld adjudications and deferred prosecutions are also included. *In re Punu*, 22 I. & N. Dec. 224 (B.I.A. 1998). A disposition that is not a "conviction" under state criminal law may still be a "conviction" for immigration purposes. *In re Salazar-Regino*, 23 I. & N. Dec. 223, 231 (B.I.A. 2002) (en banc).

misdemeanor offenses are considered.[19] Misdemeanor possession charges tend to result in probation, time served, or lesser penalties, rather than incarceration.[20]

That some states have chosen to reduce sentences or otherwise ameliorate criminal justice consequences for drug possession offenses further illustrates the disparity between the criminal justice treatment of low-level possession crimes, and the severity of mandatory deportation as a collateral consequence.[21] Arizona, for example, mandates probation and treatment for certain first and second-time drug

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[19] Misdemeanor possession offenses exist in many jurisdictions. *See, e.g.*, Alaska Stat. § 11.71.050 (various controlled substances, including marijuana and barbituates); Del. Code 16 §§ 4753-4754 (any narcotic); Haw. Rev. Stat. § 712-1246.5 ("any harmful drug"); Mass. Gen. Laws 94C § 34 (any controlled substance except second heroin offense); Mich. Comp. Laws § 333.7403 (marijuana and various hallucinogens); N.Y. Penal Law § 220.03 (any controlled substance); Tenn. Crim. Code § 39-17-418 (cocaine); Wyo. Stat. § 35-7-1031(c) (any controlled substance).

[20] *See, e.g.*, Stephanie Morin, New York State Defenders Assoc., Analysis of New York State Division of Criminal Justice Services Misdemeanor Drug Offense Statistics for the Years 1995 Through 2004 (Oct. 15, 2005), http://www.nysda.org/idp/docs/05_Analysis.pdf; New York State Dispositions – 1995 through 2004, http://www.nysda.org/idp/docs/NYS.Conviction.Sent.and.Len.pdf (in over 60% of the 258,655 New York misdemeanor possession convictions from 1995-2004, the defendant received time served, probation, conditional discharge, or a fine); Mass. Dep't of Corr., New Court Commitments to Massachusetts County Correctional Facilities During 2004, at 16 tbl. 15 (Nov. 2005), http://www.mass.gov/Eeops/docs/doc/research_reports/2004cty.pdf (showing that persons convicted of simple possession represent a small fraction of those incarcerated in Massachusetts for drug offenses).

[21] *See* Jon Wool & Don Stemen, *Changing Fortunes or Changing Attitudes? Sentencing and Corrections Reforms in 2003*, at 1 (Mar. 2004), http://www.vera.org/publication_pdf/226_431.pdf (in 2003 "[t]hirteen states made significant changes, ranging from the repeal or reduction of mandatory minimum sentences for drug-related offenses to the expansion of treatment-centered alternatives to incarceration"); *see also id.* at 1-2, 14 (noting that some states have concluded that incarceration-focused approaches to possession crimes are unsuccessful).

possession offenders.[22] California passed a similar law,[23] and Texas has decided to punish low-level, first-time possession offenses classified as felonies with community supervision and substance abuse treatment, not incarceration.[24]

Finally, defendants charged with low-level possession offenses may receive minimal procedural protections. This reflects the high volume of such offenses and the expectation that minimal criminal law consequences will result. In New York State, for example, there are tens of thousands of misdemeanor possession arrests annually. New York State Div. of Crim. Just. Servs., Adult Arrests: N.Y. State by County and Region 1994, http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/year1994.htm. New York City criminal court judges handle thousands of cases per year. Daniel Wise, *Caseloads Skyrocket in Brooklyn Courts: Upswing Linked to NYPD Narcotics Investigation*, N.Y. L.J., May 22, 2000, at 1. Most of these misdemeanors are of necessity processed extremely quickly and without substantial procedural protections. To varying degrees, this is true throughout the country. Providing relatively few procedural protections in a criminal case with low stakes may be appropriate; where mandatory deportation results, however,

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[22] Ariz. Rev. Stat. § 13-901.01; *see also State v. Gomez*, 127 P.3d 873, 877 (Ariz. 2006) (describing the intent behind the Arizona statute as being a desire to more effectively treat drug addicts and to save the state millions of dollars in incarceration costs).

[23] *See* Cal. Penal Code § 1210.1 (requiring probation for most first or second nonviolent drug possession convictions); *People v. Williams*, 131 Cal. Rptr. 2d 546, 549-50 (Cal. Ct. App. 2003).

[24] *See* Tex. Crim. P. Code art. 42.12 § 15(a)(1) (as amended by Texas H.B. 2668, Chapter 1122 (2003)); Tex. Health & Safety Code §§ 481.115(b), 481.1151(b)(1), 481.116(b), 481.121(b)(3), 481.129(g)(1); *see also Holcomb v. State*, 146 S.W.3d 723, 733 (Tex. App. 2004) ("The 2003 [Texas sentencing] amendment . . . require[s] mandatory clemency in the form of probation rather than leaving probation to the discretion of the trial court.").

the stakes are considerably higher than such treatment warrants.

B. Disproportionality Between Collateral and Direct Consequences Compromises the Integrity of the Criminal Justice System.

Where collateral immigration consequences greatly outweigh direct criminal consequences of a conviction, injustices for the defendant are not the only result. This disproportionality also adversely affects the administration of the criminal justice system and its key actors – prosecutors, defense attorneys, and judges. Robert Johnson, a former President of the National District Attorneys Association and a current officer of the ABA's Criminal Justice Section task force, has described these problems:

> Increasingly we see situations in which the collateral consequences of a criminal conviction exceed the consequences that are imposed by a judge upon sentencing. . . . . A foreigner legally in this country for many years, who may be married to a U.S. citizen and/or parent of U.S. citizens, can be deported for relatively minor offenses. . . .
>
> [A]s prosecutors, we see the effects of these collateral consequences. When the consequences are significant and out of anyone's control, victims of criminal conduct are less likely to cooperate. Defendants will go to trial more often if the result of a conviction is out of the control of the prosecutor and judge and is disproportionate to the offense and offender. . . . [M]any judges change their rulings, sentencing felonies as misdemeanors and expunging records to avoid what they believe to be an unjust result. A judge in my jurisdiction once allowed a felon to withdraw his plea of guilty after he served his prison sentence to avoid a deportation. . . .

> [T]he collateral consequences of a conviction are so severe that we are unable to deliver a proportionate penalty in the criminal justice system without disproportionate collateral consequences. As a prosecutor, you must comprehend this full range of consequences that flow from a crucial conviction. If not, we will suffer the disrespect and lose the confidence of the very society we seek to protect.[25]

Disproportionality between collateral and direct consequences adversely affects the prosecutorial function. "The duty of the prosecutor is to seek justice, not merely to convict." ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Standard 3-1.2(c) (3d ed. 1993). In order to carry out that duty, prosecutors enjoy broad discretion to decide whether and what charges to bring against an individual. *See id.* Commentary to ABA Criminal Justice Standard 3-1.2(c) at 5. Taking into account collateral consequences goes hand in hand with these obligations.[26]

Where collateral consequences are excessive in relation to the offense and cannot be averted upon conviction, however, prosecutors may find themselves sacrificing traditional criminal justice principles. Pursuing a conviction may serve the goals of punishment or deterrence but cannot be reconciled with the duty to seek justice. This can lead

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[25] Message from the President Robert M.A. Johnson, Nat. Dist. Attys. Ass'n, The Prosecutor, May/June 2001, http://www.ndaa-apri.org/ndaa/about/president_message_may_ june_2001.html ("Message from the President, NDAA").

[26] *See id.* Standard 3-3.9(b)(iii) (in deciding whether to bring charges a prosecutor may consider disproportion of the authorized punishment to the particular offense or offender); NDAA, National Prosecution Standards 42.3 (2d ed. 1991) (prosecutors may consider "[u]ndue hardship caused to the accused" in deciding whether to bring charges).

prosecutors to change a charge's wording or which offense is charged, or even to decline to bring low-level charges.[27]

In the process, state criminal law enforcement may be distorted. The non-citizen may suffer injustice if harsh immigration consequences result from a low-level offense conviction. Yet averting such consequences can require extraordinary steps that impede the fulfillment of criminal justice goals. A prosecutor might charge a non-citizen with a lesser crime to avoid excessive collateral immigration consequences. Ironically, a U.S. citizen who engages in the same conduct may therefore be charged more severely and receive harsher treatment than a non-citizen. *See* Mikos, *Enforcing State Law in Congress's Shadow*, 90 Cornell L. Rev. at 1424-25 & n.37.

Disproportionate collateral consequences also adversely affect the prosecutorial function because those consequences can dramatically alter defendants' incentives. The incentive to go to trial increases greatly where mandatory deportation will follow a plea, *see St. Cyr*, 533 U.S. at 323, even where criminal justice considerations (such as the likelihood of conviction or the prospect of an acceptable criminal sanction upon a plea) dictate otherwise. Yet prosecutors, like defense counsel, face resource constraints. Plea bargaining obviates the need for trial and concomitant expense, relieves uncertainty, and gives the parties some control over the resulting disposition. Resolving cases by plea in appropriate circumstances is therefore, as a practical matter, critical to the administration of criminal justice and to prosecutors' ability to manage their resources. Relatively minor offenses such as simple possession crimes are prime candidates for

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[27] *See* Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 Cornell L. Rev. 1411, 1454-55 (2005) (discussing examples in which prosecutors went to great lengths to circumvent defendant's deportation); Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 Ark. L. Rev. 269, 303-06 (1997)).

resolution by plea. Prosecutors face significantly increased resource pressures where defendants go to trial because a plea would trigger mandatory deportation.

The disparity between collateral and criminal consequences also affects defense counsel's role. Where mandatory deportation will result from a conviction, a defense attorney will often pursue any and all strategies to avoid that result. As one widely used criminal defense practice guide explains: "[T]he permanent immigration consequences greatly outweigh the criminal consequences in the vast majority of all criminal cases. . . . [M]ost defendants[] who . . . understand the exact meaning of the adverse immigration consequences of a proposed plea bargain, will be willing to sacrifice traditional criminal defense goals in order to protect their immigration status." Norton Tooby & Katherine A. Brady, *Criminal Defense of Immigrants* § 1.4 at 20 (3d ed. 2003). For example, assuming the non-citizen defendant considers avoiding mandatory deportation critical (almost invariably so), defense counsel is far more likely than in the ordinary case to advise that client to go to trial. *See id.* The more broadly the aggravated felony provision is construed, the more counsel's decisions are affected.

The defense function is also affected in other ways. Counsel should accurately advise clients of collateral consequences.[28] This is even more critical where the stakes are as high as mandatory deportation. *See St. Cyr*, 533 U.S. at 322 n.48; *see also, e.g., People v. Correa*, 485 N.E.2d 307 (Ill. 1985). Indeed, inaccurate advice may be a basis for a defendant to withdraw or attack a plea, including by claiming

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[28] *See* ABA Standards for Criminal Justice, Pleas of Guilty, Standard 14-3.2(f) (3d ed. 1999) ("To the extent possible, defense counsel should determine and advise the defendant sufficiently in advance of the entry of any pleas, as to the possible collateral consequences[.]").

ineffective counsel.[29] Yet it is extraordinarily difficult to advise clients when the immigration statute is read in an overly broad and non-coherent manner. Deeming low-level possession offenses to be "illicit trafficking" "aggravated felonies" is such a reading. These offenses involve no trafficking and are misdemeanors under either federal or state law. So construed, the statute can be a labyrinth of traps for the unwary, even for counsel armed with manuals such as the ABA's *The Criminal Lawyer's Guide to Immigration Law – Questions and Answers.* That most defense counsel are under-funded public defenders or legal service providers with high caseloads renders the problem more acute.

Finally, where the offense is classified as a misdemeanor under state law, there is a realistic possibility that a defendant could be unrepresented. Many states permit conviction for a misdemeanor without counsel if there will be no incarceration.[30] The critical defense role of accurately

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[29] *See Rollins v. State*, 277 Ga. 488, 492 (Ga. 2004) (holding that defendant who was erroneously advised that drug possession plea under state's First Offender Act would not result in deportation was entitled to withdraw plea); *In re Resendiz*, 25 Cal. 4th 230, 248 (2001) (holding that misadvice regarding immigration consequences may constitute ineffective assistance); *Correa*, 108 Ill. 2d at 553 ("[E]rroneous and misleading advice on the crucial consequence of deportation [meant] the defendant's pleas of guilty were not intelligently and knowingly made and therefore were not voluntary[.]"). *See also* ABA Criminal Justice Standard 14-2.1 (providing that a court should permit withdrawal of a plea if involuntary).

[30] States in which misdemeanor possession convictions may be uncounseled include Florida, *see* Fla. Stat. § 893.13(6)(a) (first degree misdemeanor marijuana possession offense); Fla. R. Crim. P. 3.111(b)(1) (no right to counsel if judge certifies there will be no incarceration); Fla. Stat. § 27.512 (court may not appoint public defender if has issued no-incarceration order), Massachusetts, *see* Mass. Gen. Laws ch. 94C § 34; *id.* ch. 274 § 1 (first and second marijuana possession offenses are misdemeanors); *id.* ch. 211D § 2A (no counsel appointed of the judge states on the record that a misdemeanor defendant will not be sentenced to incarceration); and New Hampshire, *see* N.H. Rev. Stat. § 318-B:26

advising a defendant of immigration consequences is necessarily undermined where there is no counsel. *See* ABA Criminal Justice Standard 14-3.2(f). Yet second or subsequent misdemeanors have been deemed aggravated felonies. *See, e.g., Sanchez-Villalobos*, 412 F.3d 572.

Nor is the role of the judiciary unaffected. Judges recognize that extreme immigration consequences may not be warranted in every case. ABA Standards support this principal.[31] In order to render justice and avoid condemning non-citizen defendants to mandatory deportation, judges may exercise leniency or otherwise take steps not ordinarily taken. *See* Message from the President, NDAA.

Judges too are burdened by the incentives disproportionate collateral consequences create for non-citizen defendants. In criminal courts around the country, defendants charged with minor offenses may be arraigned, plead guilty, and be sentenced all on the same day. Judges may not have the luxury of spending more than a few minutes on each case. State criminal justice systems have come to rely heavily on plea bargaining to diminish the administrative burden of dealing with large numbers of cases, including low-level drug crimes. *See Santobello v. New York*, 404 U.S. 257, 260 (1971) ("If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."). But defendants

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(class A misdemeanor marijuana possession offense); *id.* § 625:9 (VII) (a prosecutor may change a nonviolent class A misdemeanor charge to a class B misdemeanor charge) (amended in non-relevant part by 2006 N.H. Laws Ch. 64 (H.B. 1636)); *id.* § 604-A:2 (no right to appointed counsel for class B misdemeanors).

[31] *See* ABA Criminal Justice Standards 19-1.2 & 19-2.2; *see also id.* Standard 19-2.4 (courts should take into account collateral sanctions in determining a sentence, and should inform the defendant of those sanctions); *id.* Standard 19-2.5 (courts should be authorized to grant relief from collateral sanctions).

facing mandatory deportation are far more likely not only to go to trial but also to litigate post-conviction, such as by seeking to withdraw pleas or to appeal or collaterally attack their convictions. Judges, as well as prosecutors and defense counsel, therefore must expend valuable resources that might be better dedicated to matters other than intensive litigation over low-level charges.

In sum, the disproportionality between the collateral consequences of aggravated felony convictions and the direct consequences of low-level possession crimes produces myriad adverse affects on the fair and orderly administration of criminal justice.

C. The Rules of Lenity and Constitutional Avoidance, and the Fair and Regular Administration of Criminal Justice, Require a Narrow Reading of the Illicit Trafficking Aggravated Felony Provision.

Deeming low-level drug possession offenses to be illicit trafficking aggravated felonies creates a dramatic disparity between collateral and direct criminal consequences. Should the Court find the statute ambiguous, the rules of lenity and constitutional avoidance apply. Each canon compels the conclusion that the illicit trafficking aggravated felony provision only applies to felony offenses involving trafficking.

The well-settled rule of lenity requires that "any lingering ambiguities in deportation statutes [be construed] in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *see also United States v. Bass*, 404 U.S. 336, 348-49 (1971) (rule of lenity applies to criminal law provisions). A key principle animating this rule is that "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Bass*, 404 U.S. at 348; *see also St. Cyr*, 533 U.S.

at 321 (explaining that considerations of fair notice, reasonable reliance, and settled expectations properly play a role in statutory interpretation). Fair warning is sorely lacking when simple possession crimes trigger mandatory deportation for "illicit trafficking." Similarly, any ambiguity as to the meaning of "aggravated felony" must be resolved in favor of a narrow reading that does not include misdemeanors. Individuals charged with misdemeanor possession offenses lack fair notice that they will be deemed "aggravated felons." Indeed, the criminal justice system commonly treats these offenses in a summary fashion, with minimal procedural protections and speedy disposition by plea bargain in almost all cases. These defendants can reasonably expect relatively minor direct criminal consequences. For mandatory deportation to follow is quite another matter.[32]

The rule of constitutional avoidance also counsels that illicit trafficking aggravated felonies do not include low-level possession crimes. Assuming there were "two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail[.]" *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). This principle "rest[s] on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Id.* at 381.[33] Deeming low-level simple possession to constitute an illicit trafficking aggravated felony threatens to run afoul of the void for

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[32] The rule of lenity compels reading the statute to exclude low-level possession crimes for additional reasons as well. *See* Lopez Br. at III.B & C; Toledo-Flores Br. at E.

[33] *See also* Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1960-61 (1997) (providing examples of cases where the Court construed a statute narrowly to avoid a constitutional question ultimately resolved in favor of the broader reading).

vagueness doctrine, itself based in the Due Process Clause. *See Jordan v. De George*, 341 U.S. 223, 230 (1951). That doctrine, applicable in the immigration context "in view of the grave nature of deportation," requires that a statute "convey[] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Id.* at 231-32. Such warning is lacking in cases involving low-level possession offenses, including Petitioner's as well as second or subsequent misdemeanors.[34] The "illicit trafficking" "aggravated felony" statutory language does not convey that such offenses would be included. The manner in which the criminal justice system deals with such offenses further demonstrates this point. These offenses may be addressed in a fairly summary fashion; the direct criminal consequences are relatively low stakes.[35] A non-citizen in such circumstances lacks sufficient warning as to deportation consequences.

III. THE ILLICIT TRAFFICKING AGGRAVATED FELONY PROVISION SHOULD BE CONSTRUED TO AVOID NON-UNIFORMITY PROBLEMS.

Congress is generally presumed to legislate with uniformity in mind. *See Jerome v. United States*, 318 U.S. 101, 104 (1943) ("[I]n the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law."). Moreover, immigration law is quintessentially a matter of federal policy and should be uniform.

Uniformity in immigration law also has constitutional underpinnings. The one provision in the U.S. Constitution expressly referring to the federal immigration power

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[34] The constitutional avoidance principle applies "whether or not th[e] constitutional problems pertain to the particular litigant before the Court." *Clark*, 543 U.S. at 724.

[35] In some instances, convictions could even be obtained without counsel.

provides: Congress shall "establish a uniform Rule of Naturalization." U.S. Const. art. I, § 8. Congress's power over naturalization must "necessarily be exclusive [to the federal government]; because if each State had power to prescribe a Distinct Rule, there could be no Uniform Rule." The Federalist No. 32 at 199 (Alexander Hamilton) (Clinton Rossiter ed. 1961).[36] This Court has not construed the Uniform Rule provision, but has recognized the principle of uniformity in immigration law. *See Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1875) ("The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco," requiring "a uniform system or plan[.]"); *Hines v. Davidowitz*, 312 U.S. 52, 73 (1941) ("[T]he treatment of aliens, in whatever state they may be located, [is] a matter of national moment.").[37]

ABA policy further counsels uniformity. Limiting collateral sanctions "to those that are specifically warranted by the conduct constituting a particular offense" necessarily means that immigration consequences should not vary based on the arbitrary fact of geography. ABA Criminal Justice Standard 19-1.2. ABA policy that the aggravated felony provision should not be read to include misdemeanors under

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[36] The Constitution refers to naturalization, but "the Federal Government['s]" "broad constitutional powers" include "determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization." *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948). Also, aggravated felonies implicate naturalization. *See supra* p.14 note 17.

[37] *See also Graham v. Richardson*, 403 U.S. 365, 382 (1971) ("Congress' power is to 'establish a uniform Rule of Naturalization.' A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity.").

either state or federal law also recognizes that including such crimes raises non-uniformity problems. *See infra* pp.29-30.[38]

Thus, the illicit trafficking aggravated felony provision should be construed so as to avoid non-uniformity problems arising from attaching immigration consequences to state-law convictions. Constitutional concerns underscore that Congress did not intend to foster non-uniformity through the aggravated felony provision. *See Clark*, 543 U.S. at 380-81.

As presently applied, the illicit trafficking aggravated felony provision triggers varying immigration consequences depending on the geographical happenstance of where the non-citizen was convicted. On the one hand, as Petitioner's case illustrates, simple possession may be deemed an aggravated felony if the offense is a felony under state law. But while some states have made a local policy choice to classify possession crimes as felonies, others have chosen differently. Basing the aggravated felony designation on the state's felony classification has "the paradoxical result of allowing states, in effect, to impose banishment from the United States as a sanction for a violation of state law. For then if a state made the possession of one marijuana cigarette a felony, which it is perfectly entitled to do, it would be in effect annexing banishment from the United States to the criminal sanction." *Gonzales-Gomez v. Achim*, 441 F.3d 532, 535 (7th Cir. 2006).[39]

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[38] Uniformity is also a matter of basic fairness. *See Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976) ("Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.").

[39] *See also Gerbier*, 280 F.3d at 312 (noting the "real possibility" of "disparate results" that contravene the uniformity principle if the fact that a state classifies a drug offense as a felony suffices to make it an "aggravated felony"). Nor is this the first time the aggravated felony provision has been applied, at least initially, so as to compromise uniformity. *See, e.g., Solorzano-Patlan v. INS*, 207 F.3d 869, 874 (7th Cir. 2000) (rejecting the former INS's argument that a non-citizen's

On the other hand, the approach adopted in some circuits of deeming second or subsequent state-law misdemeanors to be aggravated felonies also raises non-uniformity problems. Such offenses could be prosecuted as felonies under federal law. *See* 21 U.S.C. § 844. However, federal law imposes strict requirements on the government for doing so. The United States Attorney must file an information alleging, and then must subsequently prove, that the defendant had a valid final conviction for a prior drug offense. *See id.*; *Steele*, 236 F.3d at 137-38. The defendant may challenge the prior conviction as unlawfully obtained. *See* 21 U.S.C. § 851. States vary as to whether they have such procedural schemes for repeat misdemeanor offenses and whether those procedures are utilized.[40] Thus, depending on the state at issue, a non-citizen with a second misdemeanor may or may not have received those additional protections.[41]

Non-uniformity also results from deeming second misdemeanor possession convictions to be aggravated felonies for another reason. As described above, the procedural protections afforded during the criminal justice process can vary depending on whether the charge is for a felony or a misdemeanor. *See supra* pp.16-17. And while states typically classify all offenses actually involving trafficking as felonies, they vary as to how they classify and

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conviction was a "burglary offense" aggravated felony simply because he was convicted under an Illinois statute entitled "burglary," where other states would not apply that label and the Illinois offense did not correspond to the generic "burglary" definition).

[40] Massachusetts, for example, has an enhanced penalty provision for recidivists that imposes analogous requirements. *See* Mass. G.L. ch. 278, § 11A. But many states do not.

[41] Requiring that the state prosecution satisfied procedural requirements analogous to those existing under federal law is one approach to this problem, *see Steele*, 236 F.3d at 137-38, but does not ameliorate non-uniformity. This rule could only apply in states that have such procedural requirements, and only some states do.

treat simple possession offenses. In a state where the offense is a misdemeanor, mandatory deportation could result based on a conviction obtained with a lesser degree of due process than in other states. The variance in treatment could be dramatic in congested court systems where misdemeanor offenses may be resolved in a matter of minutes, or in states that may not always provide counsel for a misdemeanor.

The statute should be construed to avoid non-uniformity problems. *See Clark*, 543 U.S. at 380-81. Non-uniformity implicates the "uniform Rule" requirement.[42] Moreover, permitting the accident of geography to determine whether an offense is an aggravated felony leads to fair notice problems. A non-citizen cannot be expected to reasonably understand or be able to predict the collateral consequences of a low-level offense conviction in those circumstances. *See supra* pp.25-26. Adopting a narrower reading of the illicit trafficking aggravated felony provision avoids these constitutional doubts. The aggravated felony designation should apply only to state-law felonies and only where those felonies are not misdemeanors under federal law. Furthermore, the designation should apply only when trafficking is involved. In this manner, the non-uniformity introduced by sweeping individuals such as Petitioner, or second-time misdemeanants, into the "illicit trafficking" aggravated felony category would be avoided.

CONCLUSION

For the foregoing reasons, the ABA respectfully submits that the Court should reverse the decision of the Court below.

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[42] *See generally* Iris E. Bennett, *The Unconstitutionality of Nonuniform Immigration Consequences of 'Aggravated Felony' Convictions*, 74 N.Y.U. L. Rev. 1696 (1999).

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In The
Supreme Court of the United States

JOSE ANTONIO LOPEZ,

Petitioner,

v.

ALBERTO R. GONZALES,
Attorney General of the United States,

Respondent.

REYMUNDO TOLEDO-FLORES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writs Of Certiorari To The United States Courts Of Appeals For The Eighth And Fifth Circuits

BRIEF FOR AMICI CURIAE ASIAN AMERICAN JUSTICE CENTER, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN LAW CAUCUS, ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA, CASA OF MARYLAND, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., CENTER FOR GENDER & REFUGEE STUDIES, COALITION OF IRISH IMMIGRATION CENTERS, CUBAN AMERICAN BAR ASSOCIATION, FAMILIES FOR FREEDOM, HEBREW IMMIGRANT AID SOCIETY, HISPANIC NATIONAL BAR ASSOCIATION, JUVENILE LAW CENTER, LAWYERS' COMMITTEE FOR CIVIL RIGHTS, LEGAL MOMENTUM, LUTHERAN IMMIGRATION AND REFUGEE SERVICE, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, NATIONAL CENTER FOR YOUTH LAW, NATIONAL COUNCIL OF LA RAZA, NATIONAL NETWORK TO END VIOLENCE AGAINST IMMIGRANT WOMEN, NEW YORK IMMIGRATION COALITION, PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., PUERTO RICAN BAR ASSOCIATION, U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS IN SUPPORT OF PETITIONERS

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Black's Law Dictionary (8th ed. 2004) 12

Carlson, Eve B., Ph.D. & Joseph Ruzek, Ph.D., *Effects of Traumatic Experiences: a National Center for PTSD Fact Sheet*, http://www.ncptsd.va.gov/facts/general/fs_effects.html (last visited June 13, 2006) 20

Hearing on H.R. 1685, H.R. 1714, H.R. 1799, H.R. 1275, H.R. 1814 and H.R. 1850 Before the Subcommittee on Immigration, Border Security, and Claims of the Committee on the Judiciary, 108th Cong. 1 (2003) 20

Oliver, Lynette, *Chefs: Martin Abundis, Chez Zee*, The Good Life (Dec. 2001) 24

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Rice, Dale, *Aside from Some Quibbles, Chez Zee Earns a "Mais Oui,"* Austin American Statesman (Dec. 16, 2004) 24

Rice, Dale, *Five Chefs, 10 Years, One Good Cause*, Austin American Statesman (Oct. 12, 2005) 24

Rice, Dale, *Heaven Arrives, via the Dessert Cart*, Austin American Statesman (Nov. 20, 2000) 24

U.S. Department of Veteran Affairs, Epidemiological Facts about PTSD (summarizing National Vietnam Veterans Readjustment Survey and National Comorbidity Survey), http://www.ncptsd.va.gov/facts/general/fs_epidemiological.html (last visited June 13, 2006) 20

INTEREST OF AMICI CURIAE

Amici curiae are organizations whose members, constituents, and clients face the real-world consequences of classifying non-citizens with simple possession offenses as drug traffickers under immigration law.[1] We speak on behalf of individuals who have lived and worked in this country from a young age, have U.S. citizen spouses and children, served this country in times of war, and face persecution abroad if deported. This brief presents actual cases of individuals whose rights will be affected by the Court's ruling, illustrating through examples the different consequences of classifying simple possession offenses as aggravated felonies.

Amici consist of the following organizations:

- Asian American Justice Center
- Asian American Legal Defense and Education Fund
- Asian Law Caucus
- Asian Pacific American Legal Center of Southern California
- CASA of Maryland
- Catholic Legal Immigration Network, Inc.
- Center for Gender & Refugee Studies
- Coalition of Irish Immigration Centers
- Cuban American Bar Association
- Families for Freedom
- Hebrew Immigrant Aid Society

[1] Amici curiae state that no party or its counsel has authored this brief in whole or in part, and no person or entity other than amici, their members, or their counsel have made any monetary contribution to its preparation. This brief is filed with the consent of all parties, and copies of the consent letters have been lodged with the Clerk of the Court.

- Hispanic National Bar Association
- Juvenile Law Center
- Lawyers' Committee for Civil Rights
- Legal Momentum
- Lutheran Immigration and Refugee Service
- Mexican American Legal Defense and Educational Fund
- National Center for Youth Law
- National Council of La Raza
- National Network to End Violence Against Immigrant Women
- New York Immigration Coalition
- Puerto Rican Legal Defense and Education Fund, Inc.
- Puerto Rican Bar Association
- U.S. Committee for Refugees and Immigrants

More detailed descriptions of amici are included in the appendix to this brief.

SUMMARY OF ARGUMENT

Our clients, constituents, and members are workers, employers, students, veterans, parents, and other valued members of American society. They have developed deep roots in our country, working, owning businesses, raising families, paying taxes, and serving in the military. Because of their convictions for drug possession, they are removable under the immigration laws. If incorrectly characterized as traffickers under the immigration laws, these individuals would additionally be labeled "aggravated felons" and subjected to mandatory deportation. As aggravated felons, they would be categorically barred from applying for discretionary, humanitarian relief from

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removal, and permanently denied the opportunity to become U.S. citizens.

Amici urge the Court to recognize the distinction Congress has drawn between simple possession offenses and drug trafficking offenses. The plain language and legislative history of the statutory provision at issue, 8 U.S.C. § 1101(a)(43), underscore the plain meaning distinction between trafficking and possession. Our clients, constituents, and members who have been found guilty of simple possession are not traffickers. Their convictions were not for sale or distribution, but for possession. In the period since their convictions, which in many cases occurred long ago, many have rehabilitated themselves and led peaceful and meaningful lives. They should have the opportunity to seek discretionary, humanitarian relief from removal.

If the Court finds that the statute is unclear in drawing a distinction between simple possession and trafficking, the rule of lenity requires the narrowest reading of the statute, in recognition of the penalties at stake in immigration and criminal cases. If treated as drug traffickers and aggravated felons, our clients, constituents, and members face the harshest of penalties: separation from their spouses and children, many of whom are U.S. citizens, and from the country they served as decorated soldiers.

Amici urge the Court to adopt a reading of the statute that distinguishes between possession and trafficking, and allows our clients, constituents, and members to apply for discretionary, humanitarian relief. The most severe penalties of the immigration laws – reserved for drug traffickers and other aggravated felons – should not be

automatically applied to individuals whose convictions are for simple possession offenses.

BACKGROUND

Those members of our community who are non-citizens with simple possession criminal convictions are already subject to removal under current immigration law. At issue in this case is whether they should be treated as drug traffickers, and thus be subject to the harsh additional penalties that accompany that characterization. Non-citizens with drug trafficking convictions are treated as aggravated felons, and are categorically barred from applying for virtually all forms of discretionary relief from removal and permanently prohibited from naturalized U.S. citizenship.

A. Non-Citizens With Simple Possession Offenses Are Currently Subject to Removal Under the Immigration and Nationality Act.

The immigration statute imposes severe immigration penalties for virtually every non-citizen convicted of a simple possession offense. Non-citizens with possession convictions are deportable under 8 U.S.C. § 1227(a)(2)(B), which provides that "[a]ny alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."

The question in this case is whether these non-citizens should also be subjected to the *additional* penalties the

Immigration and Nationality Act (INA) reserves for non-citizens with drug trafficking convictions, who are treated as aggravated felons under the immigration laws. As aggravated felons, non-citizens convicted of drug trafficking are barred from virtually all forms of discretionary relief from removal, including cancellation of removal and asylum, two forms of humanitarian relief typically available in removal proceedings.[2] They are also permanently barred from naturalized U.S. citizenship.

B. If Treated As Traffickers, Non-Citizens With Simple Possession Convictions Would Be Categorically Barred From Discretionary Cancellation of Removal.

Cancellation of removal is a form of discretionary humanitarian relief available to longtime lawful permanent residents who are deportable. Lawful permanent residents are statutorily eligible for cancellation of removal if they have been lawfully admitted as permanent residents for at least five years, have spent seven continuous years in the United States, and have not been convicted of an aggravated felony. 8 U.S.C. § 1229b(a). If a lawful permanent resident demonstrates eligibility, an

[2] Lawful permanent residents with aggravated felony convictions are also ineligible for family hardship discretionary waivers under 8 U.S.C. § 1182(h) and voluntary departure under 8 U.S.C. § 1229c(b)(1)(C). Lawful permanent residents without aggravated felonies are eligible for discretionary relief under Section 1182(h) if they can demonstrate seven years of continuous residence in the United States and that denial of admission would result in extreme hardship to a spouse, parent, or child who is a U.S. citizen or lawful permanent resident. Voluntary departure is a form of discretionary relief that allows non-citizens to leave within a designated period of time and avoid the burden of removal proceedings.

immigration judge holds an individualized hearing, during which she considers the equities of the non-citizen's case, including work history, family ties in the United States, community involvement and charity work, length of residence, and rehabilitation from any criminal history. *See In re C-V-T-*, 22 I. & N. Dec. 7, 11 (BIA 1998).

A grant of cancellation relief is not automatic upon a showing of statutory eligibility. The immigration judge retains the discretion to deny relief even in cases where a non-citizen is statutorily eligible for cancellation of removal. As the Court has observed in the context of former INA § 212(c), the statutory predecessor to cancellation of removal, "[t]raditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand." *INS v. St. Cyr*, 533 U.S. 289, 307 (2001).

If our community members who have simple possession convictions are treated as traffickers and labeled "aggravated felons," they would be barred from cancellation of removal and summarily subjected to removal.[8] An immigration judge would be prohibited from considering even the most compelling individual circumstances,

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[8] Immigrant survivors of domestic violence who are otherwise eligible for a special form of cancellation of removal created by the Violence Against Women Act (VAWA), codified at 8 U.S.C. § 1229b(b)(2), would similarly be subject to summary removal because their possession conviction, if treated as an aggravated felony, would prevent them from meeting the "good moral character" requirement of that form of relief. *See* 8 U.S.C. § 1229b(b)(2)(C); 8 U.S.C. § 1101(f). Cut off from VAWA cancellation relief, these domestic violence victims would face permanent separation from their U.S. citizen children and other family members.

including lengthy residence in the United States,[4] U.S. citizen children and spouses, and demonstrated rehabilitation from a possession conviction.

- Lindy Letisha Simon entered the United States as a lawful permanent resident (LPR) in 1974, when she was 11 years old. Thirty years later, she is a devoted mother and grandmother to a U.S. citizen son and grandson, the wife of an LPR, and a home health aide who is deeply connected to her community in Brooklyn, New York. Ms. Simon's employers characterize her as hard-working and dependable, and numerous community members attest to her devotion to her son. Ms. Simon has only one conviction, for possession of marijuana in 1998, for which she was sentenced to five years probation. Ms. Simon, who is from Trinidad and Tobago, was placed in removal proceedings because of this conviction, and applied for cancellation of removal under 8 U.S.C. § 1229b(a). The immigration judge granted her application for relief, but the Board of Immigration Appeals (BIA) reversed, holding that Ms. Simon is statutorily barred from cancellation because her possession offense constitutes trafficking under 8 U.S.C. § 1101(a)(43)(B).[5]

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[4] *Cf.* Aggravated Felonies and Deportation: How Often is the Aggravated Felony Statute Used? (June 9, 2006), http://www.trac.syr.edu/immigration/reports/158/ (reviewing cases from mid-1997 to May 2006, and concluding that individuals charged with removability based on aggravated felonies have been in the United States on average for 15 years).

[5] *See In re Simon* (BIA May 4, 2006); Respondent's Brief in Opposition to the Appeal of the Department of Homeland Security and in Support of the Decision of the Immigration Judge, *Matter of Simon* (BIA Dec. 12, 2005); Oral Decision of the Immigration Judge, *Matter of Simon* (Immigration Court, New York, NY Sept. 27, 2004). In a letter

(Continued on following page)

C. If Treated As Traffickers, Non-Citizens With Simple Possession Convictions Would Be Categorically Ineligible For Asylum.

Non-citizens who have suffered past persecution or who face a well-founded fear of persecution in their home countries are eligible for asylum under 8 U.S.C. § 1158. A conviction for a "particularly serious crime" is a statutory bar to asylum. 8 U.S.C. § 1158(b)(2)(B)(i). An individual convicted of an aggravated felony is automatically deemed to have been convicted of a "particularly serious crime." *Id.*

As with cancellation of removal, if a non-citizen demonstrates statutory eligibility for asylum, an immigration judge considers the facts of her case at an individualized hearing, during which the non-citizen and the government may present written and oral testimony and argument. Eligibility alone does not result in a grant of asylum. An immigration judge may deny asylum even in a case where a non-citizen is statutorily eligible.

If our community members who have possession convictions are treated as drug traffickers and labeled "aggravated felons," they would be categorically barred

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dated June 14, 2006, amici alerted the Clerk of the Court that this brief would refer to several documents which are not readily available on the Internet or electronic databases. These documents are the types of materials of which the Court may take judicial notice, but in order to avoid any inconvenience to the Court, amici have not sought permission to lodge these materials with the Clerk of the Court at this time. As stated in the letter, amici are prepared to lodge copies of these materials should the Court wish to review them.

from eligibility for asylum, even in cases where they could demonstrate severe persecution abroad.[6]

- Ilya Petrovich Gutnik entered the United States as a refugee in 1993, after he and his parents fled religious persecution in Ukraine, where they experienced violence and harassment because of their Jewish faith, and where Mr. Gutnik suffered a broken collarbone and nose, a puncture wound to his skull, and a severe scalp burn from a scalding stick. After his arrival in the United States, Mr. Gutnik had low self-esteem and became involved with drugs. He was arrested in 2000 for possession of 0.4 grams of heroin, receiving two years of probation under Illinois law. After undergoing drug treatment, Mr. Gutnik turned his life around, enrolling in college – where he earned a 4.0 grade point average – and obtaining a job helping teens overcome drug addiction. In 2002, Mr. Gutnik was placed in removal proceedings. He was deemed ineligible for asylum because his possession conviction was considered an aggravated felony.[7]

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[6] If classified as aggravated felons, victims of human trafficking with drug possession convictions would similarly face return to their country of origin, where they could experience retaliation and brutality by international human trafficking syndicates. Human trafficking victims who have obtained a temporary T visa under 8 U.S.C. § 1101(a)(15)(T) are barred from adjustment to lawful permanent residence if they have been convicted of an aggravated felony, because such a conviction is a bar to the required showing of good moral character. *See* 8 U.S.C. § 1255(1)(B); 8 U.S.C. § 1101(f).

[7] The immigration judge in Mr. Gutnik's case granted him withholding of removal under 8 U.S.C. § 1231(b)(3). *See* Petition for Review of an Order of the Board of Immigration Appeals, *Gutnik v. Gonzales*, No. 05-3007 (7th Cir. Sept. 19, 2005). Mr. Gutnik was statutorily eligible for withholding despite the immigration judge's conclusion that

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D. If Treated As Traffickers, Non-Citizens With Simple Possession Convictions Would Be Permanently Barred From Citizenship.

If treated as drug traffickers, non-citizens with simple possession offenses would not only be barred from cancellation and asylum, but would also be prohibited from ever naturalizing and becoming U.S. citizens. To naturalize, a non-citizen ordinarily must establish that, among other things, she has been a person of "good moral character" within the five years prior to her naturalization application, and that she has continued to exhibit good moral character during the pendency of the application. 8 U.S.C. § 1427(a). A non-citizen convicted of an aggravated felony after 1990 is statutorily barred from establishing good moral character, and is therefore permanently barred from naturalization. 8 U.S.C. § 1101(f)(8).

The lives of our community members with possession convictions illustrate that many of them are the types of individuals whom we should encourage to naturalize: many have lived most of their lives as upstanding residents of the United States, and have been rehabilitated since their single drug possession conviction.

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his possession conviction constituted an aggravated felony because his sentence did not exceed five years. *See* 8 U.S.C. § 1231(b)(3)(B)(ii) (aggravated felony conviction with sentence of at least five years is per se "particularly serious crime" barring eligibility for withholding). Unlike asylum, withholding does not permit Mr. Gutnik to adjust his status to lawful permanent residence under 8 U.S.C. § 1159(b), nor can he ultimately naturalize. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 n.6 (1987). Instead, Mr. Gutnik faces the constant possibility of removal to a third country. *Id.* Further, the standard for withholding is far more stringent than that for asylum, and thus, withholding is not available to many people who meet the well-founded fear of persecution asylum standard. *See id.* at 449.

- Gerald Harris is a 59-year-old lawful permanent resident who has lived in the United States since December 1985. He and his partner Lisa, a U.S. citizen, have two U.S. citizen children. Mr. Harris is an Oxford graduate who owns his home in Wheaton, Illinois, and has an exemplary employment record. He has been arrested or convicted only once in his life, in January 1999, for possession of 2.7 grams of cocaine. He was sentenced to probation and 30 hours of community service. Mr. Harris would like to naturalize and remain in the United States with his family. Unfortunately, however, he was placed in removal proceedings because of his possession conviction. If his possession offense is considered an aggravated felony, Mr. Harris can never naturalize because he is statutorily barred from meeting the good moral character requirement under 8 U.S.C. § 1101(f)(8).[8]

ARGUMENT

I. The Court Should Recognize the Clear Statutory Distinction Between Trafficking and Simple Possession.

The plain language of 8 U.S.C. § 1101(a)(43)(B) and available legislative history show that Congress has drawn a line between simple possession and trafficking crimes. Section 1101(a)(43)(B) nowhere mentions possession, instead referring twice to the term "trafficking." *See*

[8] Memorandum for Leave to File for Cancellation of Removal, *Matter of Harris* (Immigration Court, Chicago, IL May 26, 2004); Letter from Gerald Harris to Jayashri Srikantiah (June 2, 2006) (on file with Jayashri Srikantiah, counsel for amici).

8 U.S.C. § 1101(a)(43)(B) ("illicit trafficking in a controlled substance . . . including a drug trafficking crime. . . ."). The "ordinary or natural" meaning (*Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)) of "trafficking" is an offense that involves an element of trade, exchange, distribution for remuneration, or sale, rather than mere possession. *See* Black's Law Dictionary 1534 (8th ed. 2004).

A reading of § 1101(a)(43)(B) to include trafficking, but not simple possession, is supported by the text immediately following that statutory section. Section 1101(a)(43)(C) makes "illicit trafficking in firearms or destructive devices" an aggravated felony. This definition excludes firearms possession. *See* Brief of Amici Curiae NYSDA Immigrant Defense Project et al. [hereinafter "IDP Amicus Br."]. A consistent reading of the statute as a whole requires trafficking in both the drug and firearms contexts to refer to trading, exchanging, and selling, not mere possession.

The distinction between trafficking and simple possession is illustrated by the lives and stories of our community members, some of who have no criminal history beyond a single conviction for drug possession.

- Ruben Prado-Rivera is a lawful permanent resident who came to the United States from Mexico when he was 14 years old. He has lived in the United States for 32 years, and has a strong work history. His four children and his parents are U.S. citizens, and his wife is a lawful permanent resident. In 2000, Mr. Prado-Rivera was convicted of possession of less than one gram of cocaine. It was his only conviction, and he received no jail time for the offense. Mr. Prado-Rivera was placed in removal proceedings in

> 2002 because of his possession conviction. The immigration judge characterized his possession conviction as a trafficking offense, and hence, an aggravated felony, and found him ineligible for cancellation of removal under 8 U.S.C. 1229b(a), subjecting him to mandatory deportation without an opportunity to apply for discretionary relief.[9]

Consistent with these stories, in various contexts outside the immigration laws, Congress has recognized the distinction between trafficking and simple possession, applying lesser penalties to simple possessors than to traffickers. For example, in the criminal sentencing context, penalties for individuals who "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" any controlled substance are significantly harsher than penalties for "simple possession" of that substance. *See* 21 U.S.C. §§ 841, 844. For many substances, simple possession is punishable with a maximum of one year imprisonment, while distribution is punishable with a minimum of five years. *See id.*

Even in the bill that added the "aggravated felony" definition to the INA, Congress differentiated between trafficking and simple possession offenses regarding discretionary denials of federal benefits, establishing longer periods during which benefits can be denied to those convicted of trafficking than to those convicted of simple possession. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 § 5301, 102 Stat. 4181, 4310 (1988). Indeed, Senator D'Amato, one of the proponents of the bill's immigration provisions, saw the provisions as "focusing on

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[9] The BIA affirmed. Petition for Writ of Habeas Corpus, *Prado-Rivera v. Ridge*, No. B-04-098 (S.D. Tx. Jun. 17, 2004).

a particularly dangerous class of 'aggravated alien felons,' that is, aliens convicted of murder, and drug and firearms trafficking." 134 Cong. Rec. S17301, S17318 (1988).

The characterization of § 1101(a)(43) as targeting especially destructive criminals, such as drug traffickers, does not contemplate our community members who are longtime, contributing members of our society, and whose convictions are for simple possession.

- Maurilio Garibaldi entered the United States in 1985 and became a lawful permanent resident (LPR) in 1990. He is married to a U.S. citizen and has five U.S. citizen children. He has been continuously employed by the same employer since 1990. In 1999, Mr. Garibaldi was convicted of possession of cocaine and was sentenced to two years probation and no jail time. In 2004, his conviction was vacated, and he pled guilty under the Illinois first offender statute. Mr. Garibaldi was nevertheless placed in removal proceedings in 2004, and the immigration judge held that his possession conviction constituted an aggravated felony, barring him from cancellation of removal under 8 U.S.C. § 1229b(a).[10]

The statutory evolution of the "drug trafficking crime" definition in 18 U.S.C. § 924(c)(2) also illustrates the traditional distinction between trafficking and simple possession. The original language of § 924(c)(2) unambiguously excluded simple possession offenses, defining "drug trafficking crime" as "any felony in violation of Federal law

[10] The BIA affirmed, and Mr. Garibaldi's case is pending before the Seventh Circuit Court of Appeals. Brief and Required Short Appendix of Petitioner, *Garibaldi v. Gonzales*, No. 05-2716 (7th Cir. Aug. 24, 2005).

involving the distribution, manufacture, or importation of any controlled substance." *See* 18 U.S.C. § 924(c)(2) (1982 & Supp. IV 1986). Congress's 1988 modification of the definition has been interpreted merely to clarify the types of trafficking crimes and trafficking conspiracy crimes that are included, rather than to broaden dramatically the categories of offenses the definition covers. *See* IDP Amicus Br.

Reading the term "trafficking" to include the offense of simple possession would punish lawful permanent residents who are well-established, positive contributors to American society and whose sole or most serious conviction is for simple possession.

- Lawful permanent resident Maria Romo has lived in the United States for 23 years, since she was 18 years old. She has three U.S. citizen children, a lawful permanent resident husband, and a U.S. citizen sister. Ms. Romo had no criminal record when she was arrested in 1993, after police found in her car marijuana belonging to a friend of her sister. With little knowledge of the legal system, she followed the advice of her criminal defense attorney, and accepted a deferred adjudication under the Texas Code of Criminal Procedure. No conviction was entered into her record, and, in accordance with then-applicable Fifth Circuit precedent, Ms. Romo was told that her plea would carry no immigration consequences. In 1997, however, Ms. Romo was detained and placed in removal proceedings. She was found to be statutorily ineligible for cancellation of removal under 8 U.S.C. § 1229b(a) because

her deferred adjudication for simple possession was treated as an aggravated felony.[11]

II. The Rule of Lenity Compels An Interpretation That Recognizes the Distinction Between Simple Possession and Trafficking.

Should the Court find that the plain language of 8 U.S.C. § 1101(a)(43) is ambiguous in distinguishing between drug trafficking and drug possession, the "longstanding principle" of lenity demands that the statute be construed narrowly, "in favor of the alien." *St. Cyr*, 533 U.S. at 320 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). The Court in the present instance is confronted with a criminal statute carrying serious criminal (*Toledo-Flores*) and immigration (*Lopez*) consequences. The rule of lenity applies with full force in both contexts. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.").

The rule of lenity – requiring narrow construction of ambiguous statutes – is a robust, ancient principle, articulated in the Court's earliest criminal and immigration jurisprudence. It has long been applied to criminal statutes. *See, e.g.*, *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."). The rule demands strict construction in favor of

[11] Declaration of Maria de Jesus Romo in Support of Petition for Writ of Habeas Corpus and Motion for Modification of Judgment, *State v. Romo*, No. 93-012-3041 (24th Judicial Dist., Tex. July 7, 2003).

criminal defendants to promote "fair notice," "minimize the risk of selective or arbitrary enforcement," and "maintain the proper balance between Congress, prosecutors, and courts." *United States v. Kozminski*, 487 U.S. 931, 952 (1988). Because the Court has long sought to avoid "imputing to Congress an undeclared will," *Bell v. United States*, 349 U.S. 81, 83 (1955), it has reaffirmed the dictum that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland v. United States*, 531 U.S. 12, 25 (2000). Given the stakes of criminal conviction and the presence of multiple readings of a statute, "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication." *United States v. Universal*, 344 U.S. 218, 222 (1952).

The immigration rule of lenity similarly accounts for the dire consequences of deportation. *See Bridges v. Wixon*, 326 U.S. 135, 147 (1945) ("[D]eportation may result in the loss 'of all that makes life worth living.'") (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)); *see also Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947) ("The stakes are indeed high and momentous for the alien who has acquired his residence here."). The Court has reaffirmed the rule of lenity in immigration cases time and again, even as applied to particularly violent crimes. The Court long ago recognized the importance of the rule of lenity in deportation cases in *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948), addressing a petitioner previously sentenced to life imprisonment for two counts of murder. The Court concluded that "because deportation is a drastic measure and at times the equivalent of banishment or exile . . . we will not assume that Congress means to trench on [] freedom beyond that which is required by the

narrowest of several possible meanings of the words used." *Id.* at 10. The Court has consistently applied the rule of lenity to statutes with deportation consequences, across crimes and statutes varying greatly in levels of severity and ambiguity. *Compare Barber v. Gonzales*, 347 U.S. 637 (1954) (invoking lenity to define "entry" as applied to a foreign-born U.S. national convicted of assault with a deadly weapon and second degree burglary); *with Bonetti v. Rogers*, 356 U.S. 691 (1958) (invoking lenity to interpret "entry" as applied to a former criminal Communist Party member); *and Costello v. INS*, 376 U.S. 120 (1964) (invoking lenity to construe the word "is" as applied to a former citizen whose citizenship was revoked after two separate offenses of income tax evasion).

In *Lopez*, as in the Court's recent decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the ambit of the term "aggravated felony" as applied to removal cases is in question. The Court's inquiry in *Leocal* turned on whether a noncitizen's offense of driving under the influence of alcohol could be broadly construed as a "crime of violence" under 18 U.S.C. § 16(b), and thus an "aggravated felony" under 8 U.S.C. § 1101(a)(43). The Court rejected such an expansive reading of 18 U.S.C. § 16(b) on the basis of its plain language, but observed that "even if [it] had lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner's favor" under the rule of lenity. 543 U.S. at 12.

Here, the narrowest construction of 8 U.S.C. § 1101(a)(43), and the one most consistent with the rule of lenity, does not construe "illicit trafficking" to encompass drug possession, with the effect of transforming the latter into an aggravated felony. The distinction between selling drugs for profit and possessing them for personal use

would, under the Government's reading, be blurred. The consequence of such a reading for many non-citizens is stark: they would subsequently be deemed aggravated felons, subject to deportation without immigration judge discretion even to consider requests for humanitarian relief from removal.[12] This flouts the rule of lenity by significantly increasing the number of non-citizens who would be barred from discretionary relief and naturalization. The reading most consistent with the rule of lenity follows the narrow construction articulated by Amici NYSDA Immigrant Defense Project et al., in which a trafficking offense must actually involve an element of trade, exchange, or sale. Similarly, in *Toledo-Flores* – which involves both immigration and criminal statutes – the rule of lenity requires a narrow interpretation.

III. Consistent With the Rule of Lenity, the Statute Should Be Interpreted to Avoid Subjecting Non-Citizens to Permanent Separation From Family and Community.

A. Decorated Combat Veterans Who Have Risked Their Lives for This Country, and Who Have Only Simple Possession Convictions, Should Not Be Treated As "Aggravated Felons" and Barred From Discretionary Relief.

Our community includes lawful permanent residents who have served in the U.S. military.[13] War veterans may

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[12] In a recent decision, Judge Posner observed: "The only consistency that we can see in the government's treatment of the meaning of 'aggravated felony' is that the alien always loses." *Gonzales-Gomez v. Achim*, 441 F.3d 532, 535 (7th Cir. 2006).

[13] As of 2003, more than 37,000 lawful permanent residents serve in the U.S. military, comprising approximately 2.7% of the U.S. Armed

(Continued on following page)

suffer post-traumatic stress disorder (PTSD) upon reintegration to the United States.[14] According to a U.S. Department of Veteran Affairs fact sheet, "[s]urvivors may turn to alcohol and drug abuse when they want to avoid the bad feelings that come with PTSD symptoms. Many people use alcohol and drugs as a way to try to cope with upsetting trauma symptoms. . . ."[15]

As with their citizen counterparts, with treatment, non-citizen veterans are able to recover from their addiction, and live successful lives free of drugs. These veterans should not be punished as drug traffickers and barred from discretionary cancellation of removal, through which they could demonstrate rehabilitation to an immigration judge.

- Alberto Torres served honorably in the U.S. Navy from 1989 to 1995, and was noted by his supervisors for his "outstanding" and "superior" performance. He has been a lawful permanent resident of the United States since 1978, and his

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Forces. *See Hearing on H.R. 1685, H.R. 1714, H.R. 1799, H.R. 1275, H.R. 1814 and H.R. 1850 Before the Subcommittee on Immigration, Border Security, and Claims of the Committee on the Judiciary*, 108th Cong. 1 (2003) (statement of Rep. Hostettler). Approximately 11,800 members of the National Guard and Reserve are non-citizens, out of a total of 1,353,000. *See id.*

[14] According to two recent studies, whereas the estimated lifetime prevalence of post-traumatic stress disorder amongst adult Americans is 5% for men and 10.4% for women, the numbers for American Vietnam theater veterans are 30.9% and 26.9% respectively. U.S. Department of Veteran Affairs, Epidemiological Facts about PTSD, http://www.ncptsd.va.gov/facts/general/fs_epidemiological.html (last visited June 13, 2006) (summarizing National Vietnam Veterans Readjustment Survey and National Comorbidity Survey Report).

[15] Eve B. Carlson, Ph.D. & Joseph Ruzek, Ph.D., *Effects of Traumatic Experiences: a National Center for PTSD Fact Sheet*, http://www.ncptsd.va.gov/facts/general/fs_effects.html (last visited June 13, 2006).

parents, wife, and three children are all U.S. citizens. He has a strong employment history, and he and his wife own their home and several other properties in the U.S. In 2004, Mr. Torres was convicted of possession of less than one gram of cocaine. He has no other criminal record. Subsequent to his conviction, a Texas criminal court granted his motion for a new trial and dismissed his indictment, upon a motion of the district attorney. Nonetheless, Mr. Torres was placed into removal proceedings, and an immigration judge deemed his original possession conviction to be an aggravated felony. Mr. Torres was found to be statutorily ineligible for cancellation of removal under 8 U.S.C. § 1229b(a), and ordered deported.[16]

- Decorated U.S. Navy veteran A.S. left the Philippines for the United States at the age of nine. He enlisted in the U.S. Navy in 1990, and served in Operations Desert Shield and Desert Storm as well as in Somalia. For his service Mr. S received numerous awards, including the National Defense Award, a Navy Unit Commendation, and the Gold Star. While in service, he married and had three U.S. citizen children. Unfortunately, once his military service was complete, he became depressed and developed a short-lived drug habit. Mr. S pled guilty to two possession offenses less than a month apart in December 2002 and January 2003. He completed a substance abuse program immediately thereafter. Mr. S was placed in removal proceedings in 2003, but the Department of Homeland Security ultimately exercised prosecutorial discretion in his case, and

[16] *See* Brief for Petitioner, *Torres v. Gonzales*, No. 05-60906 (5th Cir. Feb. 6, 2006).

his proceedings were terminated.[17] Under the government's interpretation of 8 U.S.C. § 1101(a)(43)(B), individuals like Mr. S would be subjected to mandatory removal.[18]

B. Treating Non-Citizens With Simple Possession Convictions As "Aggravated Felons" Separates U.S. Citizen Children From Their Parents.

Many of our community members are immigrants in mixed-status families, in which lawful permanent residents are spouses and parents of U.S. citizens. If lawful permanent residents with simple possession convictions are treated as traffickers, U.S. citizen children will lose their parents, and U.S. citizen parents will lose their spouses. This separation has a particularly distressing effect on low-income families who cannot afford to fly their children to faraway countries to visit their permanently exiled non-citizen parents. Removal may also mean eliminating financial support from a primary family bread-winner. Children of parents ordered removed will suffer the difficulties of losing the financial and emotional support of a parent.

Longtime permanent resident parents with simple possession convictions should be entitled to a discretionary

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[17] Exercises of prosecutorial discretion are extremely rare. Mr. A.S. would be barred from naturalizing if his possession conviction is deemed an aggravated felony.

[18] Respondent's Pre-Hearing Brief, *Matter of A.S.* (Immigration Court, Eloy, AZ May 15, 2003). Mr. S's attorney requested that his initials be used in this brief to protect his privacy.

cancellation of removal hearing in which they can demonstrate family ties to U.S. citizen children and spouses.

- Erick Ibarra-Cruz is a citizen of Guatemala who became a lawful permanent resident of the United States in 1984. He has twin sons who are U.S. citizens. Their mother, Mr. Ibarra's former spouse, died in 1999, leaving him as their sole provider. Mr. Ibarra's only conviction is for possession of less than 15 grams of cocaine – the lowest amount that could be charged under the applicable statute – for which he received two years of first-offender probation. Mr. Ibarra was placed in removal proceedings in 2003 based on this conviction. Because the immigration judge deemed his possession conviction to be a trafficking offense, and thus an aggravated felony, he was statutorily barred from applying for cancellation of removal under 8 U.S.C. § 1229b(a).[19]

C. Under the Government's Interpretation, Lawful Permanent Residents Who Have Never Served Time for Minor Possession Offenses Would Be Subject to Mandatory Deportation.

Some of our community members have never served any time for their drug possession convictions. The immigration penalty of mandatory deportation and ineligibility for

[19] The BIA summarily affirmed the decision of the immigration judge. Petitioner-Appellants' Brief and Required Short Appendix, *Ibarra-Cruz v. Gonzales*, No. 05-2828 (7th Cir. Sept. 23, 2005).

naturalization are far more severe than any criminal penalty imposed in their cases.[20]

Under the government's position, a non-citizen who has deep ties to the United States, and who pleads guilty to a possession offense (even if he did not know the immigration consequences of doing so at the time), would be subject to mandatory deportation. This would be true even in cases where the non-citizen never served any time for his conviction, and where the non-citizen can demonstrate rehabilitation and deep ties to the United States.

- Martin Abundis is a popular executive chef at Chez Zee restaurant in Austin, Texas.[21] Mr. Abundis is a lawful permanent resident who has lived in the United States since he was 15 years old.[22] In 1995, Mr. Abundis was convicted of possession of less than one gram of cocaine, and was sentenced only to probation.[23] That was his only conviction. Mr. Abundis is now an executive chef at an acclaimed restaurant, and is a regular fixture

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[20] Under the law of some states, non-citizen defendants who do not face incarceration for misdemeanor possession offenses may not be appointed counsel during their criminal proceedings. *See, e.g.*, Colo. Rev. Stat. Ann. § 16-5-501 (2006) (Colorado); Fla. Stat. Ann. § 27.512 (2006) (Florida); Mass. Gen. Laws Ann. ch. 211D, § 2A (2006) (Massachusetts).

[21] *See* Lynette Oliver, *Chefs: Martin Abundis, Chez Zee*, The Good Life, Dec. 2001, at 36; Dale Rice, *Heaven Arrives, via the Dessert Cart*, Austin American Statesman, Nov. 20, 2000, at C2; Dale Rice, *Aside from Some Quibbles, Chez Zee Earns a "Mais Oui,"* Austin American Statesman, Dec. 16, 2004, at 6XL; *Five Chefs, 10 Years, One Good Cause*, Austin American Statesman, Oct. 12, 2005, at E3.

[22] Oliver, *supra* n.20, at 36.

[23] Letter from Simon Azar-Farr, attorney for Mr. Abundis, to Marc Moore, Field Office Director, U.S. Citizenship and Immigration Services (Nov. 18, 2005) (on file with Jayashri Srikantiah, counsel for amici).

on the Austin culinary scene, with deep ties to the community. His wife and three children are U.S. citizens, and all are registered parishioners of the local Catholic church.[24] In 2005, Mr. Abundis was placed in removal proceedings because of his possession conviction. More than twenty individuals wrote letters of support in Mr. Abundis's case, including the former mayor of Austin.[25] Under the law of the Fifth Circuit, however, Mr. Abundis is statutorily ineligible for cancellation of removal under 8 U.S.C. § 1229b(a) because of his possession conviction.[26]

D. If Treated as Traffickers, Non-Citizens With Simple Possession Convictions Face Deportation to Countries Where They Suffered Persecution.

The effect of mandatory deportation is particularly severe for non-citizens who have come to this country to flee persecution abroad. These individuals may suffer from the ongoing traumatic effects of persecution and torture, and some may make the mistake of temporarily turning to drugs or alcohol to cope. However, the lives of our community members illustrate that asylum-seekers can and do rehabilitate themselves from the unfortunate decision to turn to drugs, and any resulting possession conviction.

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[24] *See id.* (attaching letter from church).

[25] *See id.* (attaching letter from Kirk Watson, former Mayor of Austin).

[26] *See Salazar-Regino v. Trominski*, 415 F.3d 436 (5th Cir. 2005), *petition for cert. pending*, No. 05-830 (filed Dec. 22, 2005).

- Jose Sanchez Carbonell fled persecution from Cuba, where he experienced harassment and torture by the police because of his sexual orientation. He was paroled into the United States for humanitarian reasons. Mr. Sanchez was later diagnosed with mild schizophrenia. In 2002, Mr. Sanchez was arrested for possession of less than 1 gram of cocaine in California, and was sentenced to three years probation and a $200 fine. He was subsequently placed in removal proceedings, and applied for asylum. Under the government's position, Mr. Sanchez would be ineligible for asylum because of his drug possession conviction.[27]

CONCLUSION

For the foregoing reasons, Amici urge the Court to reverse the decisions of the courts of appeals.

June 19, 2006

Respectfully submitted,

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[27] *See* Respondent's Pre-Hearing Statement, *Matter of Sanchez Carbonell* (Immigration Court, Chicago, IL Mar. 14, 2006). Mr. Sanchez was granted withholding of removal under 8 U.S.C. § 1231(b)(3), for which the standard is much higher than asylum. *See supra* n.7. A grant of withholding of removal also does not provide a pathway to legal permanent residence or citizenship. *See id.*

DESCRIPTION OF AMICI

The **Asian American Justice Center (AAJC)** is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, AAJC and its affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing public policy, advocacy, and community education on a wide range of issues that affect the Asian Pacific American community. Immigration law and policy has a particular impact on the Asian Pacific American community because over two-thirds of our community is foreign-born.

The **Asian American Legal Defense and Education Fund (AALDEF)**, founded in 1974, is a New York-based non-profit organization that defends the civil rights of Asian Americans nationwide through litigation, legal advocacy, and community education. Since the September 11th tragedy, AALDEF has provided legal services to individuals in deportation proceedings and has supported the work of community-based organizations in their advocacy and organizing efforts against unjust deportation policies and the selective targeting of their communities for immigration enforcement.

The **Asian Law Caucus** promotes, advances, and represents the legal and civil rights of the Asian and Pacific Islander communities. The Immigrant's Rights Project at the Asian Law Caucus provides direct representation to individuals facing detention and deportation before immigration courts, the Board of Immigration Appeals (BIA) and the Ninth Circuit Court of Appeals. The Caucus handles numerous applications for cancellation of removal and other forms of criminal waivers for community members facing deportation as a result of prior criminal convictions.

Asian Pacific American Legal Center of Southern California (APALC) was founded in 1983 and is the largest non-profit public interest law firm devoted to the Asian Pacific American community. APALC provides direct legal services to indigent members of the community and uses impact litigation, policy advocacy, community education and leadership development to obtain, safeguard and improve the civil rights of Asian Pacific Americans. APALC has worked in the areas of immigration and immigrants' rights since its founding.

CASA of Maryland is a non-profit agency founded in 1985 that provides multiple services including immigration assistance, employment rights legal representation, employment training and job placement, leadership training, and education to the immigrant and refugee community in Maryland. In addition to providing direct services, CASA organizes domestic workers and women, day laborers, and tenants to work together to build better neighborhoods and stronger communities. CASA also actively involves community members in advocacy efforts that include comprehensive immigration reform. CASA is an active member of the National Capital Immigration Coalition.

The Catholic Legal Immigration Network, Inc. (CLINIC), a subsidiary of the U.S. Conference of Catholic Bishops, is a legal support agency for a national network of 159 charitable programs for immigrants. Its member agencies provide extensive legal representation to persons deemed "aggravated felons," including those with simple possession convictions, under U.S. immigration law. CLINIC attorneys also provide direct legal services to detained immigrants who are facing removal – many as

aggravated felons – in various locations around the country.

The **Center for Gender & Refugee Studies (CGRS)**, based at the University of California, Hastings College of the Law, has a direct and serious interest in the development of immigration law and in the issues under consideration. Founded in 1999, CGRS provides legal expertise and resources to attorneys representing women asylum-seekers fleeing gender-related harm and is directly involved in national asylum law and policy across a wide range of issues. The questions under consideration implicate matters of great consequence to CGRS, involving important principles of jurisprudence and statutory construction, with broad ramifications for the uniform administration of the laws.

The **Coalition of Irish Immigration Centers (CIIC)** is a national umbrella organization that represents Irish immigrant organizations providing direct services to immigrants across the United States. CIIC currently has member organizations in New York, New Jersey, Philadelphia, Massachusetts, Illinois, Maryland, California, Wisconsin, Washington and the District of Columbia. CIIC is interested in this case because it is concerned with keeping families together and with ensuring that immigrants are treated fairly and have the opportunity to access to discretionary relief from deportation.

The **Cuban American Bar Association (CABA)** was established in Miami in 1974 by a group of approximately 20 Cuban attorneys adapting to a different culture. CABA now has nearly 2,000 members, representing all segments of the Cuban American legal community. CABA is actively

involved in protecting the human rights and legal interests of Cubans and Cuban Americans.

Families for Freedom (FFF) is a multi-ethnic network for immigrants and their families facing deportation. FFF is increasingly concerned with attempts to remove discretion from immigration judges by further expanding the aggravated felony definition. This expansion has led to the separation of our families without the opportunity for a meaningful hearing before an immigration judge and has resulted in U.S. citizen mothers becoming single parents; breadwinners becoming dependents; bright citizen children having problems in school, undergoing therapy, or being placed into the foster care system; and working American families forced to seek public assistance.

The **Hebrew Immigrant Aid Society (HIAS)**, the oldest international migration and refugee resettlement agency in the United States and the migration arm of the organized American Jewish community, advocates on behalf of refugees, asylum seekers, and immigrants, and for a strong U.S. government policy to offer safe haven to victims of persecution. HIAS believes that our immigration laws must provide a fair process that can make distinctions between immigrants who are a threat to society and those who, while having made mistakes in the past, should be allowed to remain with their families and contribute to their communities.

The **Hispanic National Bar Association (HNBA)** is a non-profit, national association representing the interests of over 27,000 Hispanic American attorneys, judges, law professors, law graduates, law students, legal administrators, and legal assistants or paralegals in the United States and Puerto Rico. The mission of the HNBA is to

improve the study, practice, and administration of justice for all Americans by ensuring the meaningful participation of Hispanics in the legal profession. As a representative of the national Hispanic community, the HNBA also has an interest in promoting justice on issues of concern to Hispanic communities, including the fair implementation of the nation's immigration laws.

Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to children involved in the juvenile justice and child welfare systems. JLC works to ensure children are treated fairly by these systems, and that children receive the treatment and services that these systems are supposed to provide, including, at a minimum, adequate and appropriate education, and physical and mental health care. JLC has also represented dependent children involved in immigration cases, and has participated as *amicus* in state and federal courts throughout the country, as well as the United States Supreme Court, in cases in which important rights and interests of children are at stake.

The **Lawyers' Committee for Civil Rights** is a civil rights and legal services organization devoted to advancing the rights of people of color, poor people, and immigrants and refugees. The Lawyers' Committee is affiliated with the Lawyers' Committee for Civil Rights Under Law in Washington, D.C. which was created at the behest of President John Kennedy in 1963. Since the early 1980s, the Lawyers' Committee has litigated scores of major class actions implicating the rights of immigrants and refugees. The organization also has assisted over a thousand individuals seeking asylum in the United

States, and is committed to preserving the rights of those who may now face persecution abroad as a result of simple possession convictions.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. As a national organization that provides technical assistance to advocates working with immigrant women and children, Legal Momentum has substantial knowledge and insight into issues of domestic abuse, sexual assault, human trafficking, asylum, immigration reform, and women's rights. As co-chair of the National Network to End Violence Against Immigrant Women, Legal Momentum played a leading role in crafting the immigration provisions in the Violence Against Women Act of 1994 and subsequent reauthorizations in 2000 and 2005.

A cooperative agency of the Evangelical Lutheran Church in America, the Lutheran Church - Missouri Synod and the Latvian Evangelical Lutheran Church in America, **Lutheran Immigration and Refugee Service (LIRS)** has been the U.S. Lutheran expression of service to refugees and migrants in America since 1939. From its beginnings helping refugees from Nazi Germany during World War II to its presence as advocates for the most vulnerable, LIRS seeks to bring new hope and new life to uprooted people all over the world through access to services, resources, and justice. For some 20 years, LIRS has held a special interest in asylum seekers, torture survivors, children and other vulnerable migrants in immigration detention. LIRS supports a nationwide network of legal service providers for those in immigration detention, and continues to advocate for humane and fair laws for all migrants.

The **Mexican American Legal Defense and Educational Fund (MALDEF)** is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has litigated numerous civil rights cases, in such areas as education, immigration, employment, and voting rights. Through MALDEF's Immigration Program, it has advocated for exclusive federal enforcement of immigration laws to ensure uniformity and consistency in our national immigration policies.

The **National Center for Youth Law (NCYL)** is a private, non-profit organization devoted to using the law to improve the lives of poor children nationwide. For more than 30 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support and opportunities they need to become self-sufficient adults. NCYL's concern in this case is the effect of the courts of appeals' decisions on the dependent children of parents facing deportation.

The **National Council of La Raza (NCLR)** – the largest national Hispanic civil rights and advocacy organization in the United States – works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations (CBOs), NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. NCLR joins this brief to support the due process rights of Latino immigrants who are disproportionately affected by the intersection of immigration law with criminal law. NCLR believes that low-level nonviolent drug offenders should not be punished with deportation, and instead, would benefit from programs such as drug treatment and job training.

Founded in 1992, the **National Network to End Violence Against Immigrant Women (the Network)** is a coalition of domestic violence survivors, immigrant women, advocates, activist, attorneys, educators and other professionals working together to end domestic abuse of immigrant women. The Network is co-chaired by the Family Violence Prevention Fund, Legal Momentum, and ASISTA Immigration Technical Assistance Project. Together, these organizations use their special expertise to provide technical assistance, training, and advocacy to their communities. The Network significantly contributed to the passage of the 1994 Violence Against Women Act and has since continued to enhance the legal remedies available to immigrant survivors. Through a collaborative approach, the Network has made great progress in assuring that non-citizen victims of domestic violence, sexual assault, and trafficking are able to flee abuse, survive domestic violence crimes, and receive assistance.

The **New York Immigration Coalition** is an umbrella policy and advocacy organization with more than 150 member groups in New York that work to promote fairness and opportunity for today's immigrants and refugees.

The **Puerto Rican Legal Defense and Education Fund, Inc. (PRLDEF)** is a New York-based private not-for-profit civil rights litigation and advocacy organization that has defended the civil rights and equal protection under the law of Latinos for the past 34 years, with particular interest in protecting voting rights, employment opportunity, fair housing, language rights, educational access, and immigrants' rights. We are interested in this lawsuit because a disproportionately high number of Latino immigrants and their U.S. citizen family members are adversely harmed by the severe consequences that

flow from an aggravated felony finding, including enhanced sentencing, mandatory detention and removal, bars to immigration relief, long-term family separation, and other deprivations of civil rights.

The **Puerto Rican Bar Association (PRBA)** is a professional organization composed of members of the Bar and law students of Latino ancestry and other interested persons. The PRBA was founded to provide a forum for Latino and other lawyers who are interested in promoting the social, economic, professional, and educational advancement of Latino attorneys, the Latino community and the administration of justice, including the fair implementation of the immigration laws of the United States in the Latino community.

U.S. Committee for Refugees and Immigrants (USCRI) is a Washington, D.C.-based non-profit organization with an eighty-year history of service to refugees and immigrants. It works through thirty-five community-based partners to provide direct assistance to immigrants. USCRI operates the National Center for Refugee and Immigrant Children, which provides *pro bono* legal services and social services to hundreds of unaccompanied immigrant facing immigration court removal proceedings in 10 major cities in the United States.

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v.

ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, RESPONDENT.

REYMUNDO TOLEDO-FLORES, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Writ Of Certiorari To The United States Court of Appeals for the Eighth and Fifth Circuits

BRIEF FOR HUMAN RIGHTS FIRST AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the term "aggravated felony" as defined in 8 U.S.C. § 1101(a)(43)(B) encompasses a state felony conviction for simple possession of a controlled substance.

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James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT'L L.J. 257 (2001) 19

JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS (rev. ed. 1998) 7

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Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session, Geneva, 14 August to 25 August 1950, at *http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.htm?tbl=PROTECTION&page=home&id=3ae68c248* 7

S. Rep. No. 96-256, at 1 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141 8

U.S. Citizenship & Immigration Serv., *Types of Asylum Decisions, http://www.uscis.gov/graphics/services/asylum/types.htm#grant* 10

UNCHR Comments on Proposed Rules on "Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens: Conduct of Removal Proceedings; and Asylum Procedures," at *http://www.usaforunhcr.org* (Feb. 4, 1997) 23

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INTRODUCTION

Human Rights First, as *amicus curiae*,[1] submits this brief to alert the Court of the impact its decision may have on refugees and on this Nation's compliance with its international treaty obligations concerning refugees.

Under U.S. law, a refugee who is convicted of an "aggravated felony" is automatically barred from receiving asylum. Such a conviction is also a presumptive bar to "withholding of removal" – the form of protection granted to a refugee if there is a clear probability that her life or freedom would be at risk if she returned to her home country.

If the Government's position in this case is adopted, refugees who have fled political and religious persecution can be returned to nations where their lives and freedom are threatened, on the basis of a single state conviction for simple drug possession with no proof at all of an intent to engage in illicit drug trafficking. This is not what Congress intended. Indeed, to accept the Government's position would risk putting this Nation in violation of the Protocol Relating to the Status of Refugees, under which it agreed that it would not return a refugee to persecution as a consequence of her criminal conduct in this country unless she were convicted of a "particularly serious crime" and thus presented a danger to the community. This Court has long recognized that statutes should not be construed in a manner that would put the United States in violation of the law of nations, unless the language of the statute unambiguously compels such a result. See *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). The treaty

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[1] Counsel for all parties have consented to the filing of this brief. Letters evidencing consent are on file with the Clerk. No party or counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus* and its counsel has made a monetary contribution to the preparation or filing of this brief.

obligations discussed herein provide an additional reason to reject the Fifth and Eighth Circuits' reading of the statutes at issue, even assuming that their reading is permissible under those statutes.

INTEREST OF *AMICUS CURIAE*

Since 1978, Human Rights First (formerly known as the Lawyers Committee for Human Rights) has worked to protect and promote fundamental human rights and to ensure protection of the rights of refugees, including the right to seek and enjoy asylum.

Human Rights First grounds its refugee protection work in the standards set out in the 1951 Convention Relating to the Status of Refugees (the "Convention") and the 1967 Protocol Relating to the Status of Refugees (the "Protocol"), as well as other international human rights instruments. Human Rights First advocates that U.S. law and policy adhere to the standards set forth in these agreements.

Human Rights First operates one of the largest pro bono asylum representation programs in the country. With the assistance of volunteer attorneys, Human Rights First provides legal representation without charge to hundreds of indigent asylum applicants. Human Rights First has also conducted research, convened legal experts, and provided guidance to assist in the development of effective and fair methods for excluding from refugee protection those who are not entitled to the protection of the Convention and Protocol. See, *e.g.*, HUMAN RIGHTS FIRST, REFUGEES, REBELS & THE QUEST FOR JUSTICE (2002).

In order to protect the rights of the refugees it assists and to ensure that the protections guaranteed to them under the Convention and the Protocol remain available to refugees in the United States generally, Human Rights First addresses legal developments that would lead the United States to return refugees to persecution even though they are entitled

to protection as a result of the U.S.'s commitment to abide by these treaty obligations. Thus Human Rights First has a profound interest in the outcome of these cases.

Given Human Rights First's experience and perspective in this important area of law, it is uniquely well situated to assist the Court in understanding the relationship between the question presented here and the laws governing asylum and refugees, as well as the risk that the Fifth and Eighth Circuits' analysis poses to the United States' compliance with its international legal obligations arising under the Protocol and Convention.

STATEMENT

The cases before the Court concern the proper interpretation of the term "aggravated felony" as defined in the Immigration and Nationality Act ("INA"). As discussed further below, the Court's resolution of that question will have serious implications for some refugees because of how that term is incorporated into the statutes involving asylum and "withholding of removal."

The INA defines the term "aggravated felony" as including

> * * * illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, U.S. Code)

8 U.S.C. § 1101(a)(43)(B).[2] The term "aggravated felony" applies to an offense "whether in violation of Federal or State law." *Id.* § 1101(a)(43).

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[2] Section 102 of the Controlled Substances Act defines "controlled substance" in a manner not relevant here; it does not define the term "illicit trafficking." See 21 U.S.C. § 802.

Section 924(c)(2) of Title 18 in turn defines a "drug trafficking crime" as

> any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

18 U.S.C. § 924(c)(2). For the parties in the instant cases, the most relevant clause in this statute is the first one: "any felony punishable under the Controlled Substances Act." *Id.*

In the decisions under review, the Fifth and Eighth Circuits have interpreted this statutory scheme to mean that the category of "aggravated felonies" includes a state felony conviction for mere possession of a controlled substance—a crime that includes no element of "illicit trafficking" and that would generally be punished only as a misdemeanor under federal law. Thus those courts (as well as the Government) understand "any felony punishable under the Controlled Substances Act" to include "any ***state*** felony punishable under the Controlled Substances Act ***even as a misdemeanor.***"

Among other things, this interpretation ignores the fact that Congress referred to "drug trafficking" crimes under Section 924(c) as a subset of "illicit trafficking in a controlled substance." 8 U.S.C. § 1101(a)(43)(B). Thus, quite sensibly, Congress did ***not*** intend to include all drug-related offenses, however minor, in its definition of "aggravated felony," but instead focused on offenses that actually involve the sale or distribution of controlled substances. A state conviction for simple possession does not fit within this definition. As described further below, the interplay between these statutes and the Protocol supports a narrow reading of the statutory definition of "aggravated felony."

SUMMARY OF ARGUMENT

The definition of the term "aggravated felony" has important implications in the context of asylum, separate and apart from its implications for "cancellation of removal" (*Lopez*) and sentencing (*Toledo-Flores*). A refugee who has been convicted of an "aggravated felony" in the United States is automatically ineligible for asylum, without exception. 8 U.S.C. § 1158(b)(2)(B)(i). Additionally, an asylum applicant or other immigrant who has been convicted of an "aggravated felony" is presumptively ineligible for "withholding of removal"—the relief granted to a refugee if her life or freedom would be threatened if she were to be returned to her country of nationality. 8 U.S.C. § 1231(b)(3). And if the refugee received a sentence of five years or longer for the crime—even if it was a suspended sentence—the bar to "withholding of removal" becomes absolute. *Id.*

This issue has grave implications for this Nation's commitment to protect those who have fled from political, religious, and other kinds of persecution. Under the Fifth and Eighth Circuit's decisions, a possession conviction that may subject a U.S. citizen to probation and participation in a drug-treatment program would operate as a categorical bar for a refugee-seeking asylum. The immigration judge would have no discretion whatever to grant asylum, regardless of how great the risk of persecution the refugee faces in her home country. And a conviction for drug possession could mean that a person who has already been granted asylum will be returned to a country where she will face a threat to her life or freedom.

When it acceded to the Protocol, the United States committed to provide certain substantive protections to refugees, regardless of their legal status. Chief among these is the protection against "*refoulement*" to persecution—the return of the refugee to a place where her life or freedom would be threatened. Although the country of refuge may

deny protection against *refoulement* based on criminal convictions in that country, this bar is limited to those "who, having been convicted of a final judgment of a particularly serious crime, constitute[] a danger to the community of that country." CONVENTION, art. 33(2) (incorporated by reference and reproduction by the Protocol).

To accept the Government's position in this case would put the United States in violation of its commitments under the Protocol and the Convention—a result that Congress presumptively did not intend. Even under the restrictive federal Controlled Substances Act, it is difficult to imagine how a simple possession offense with no proof of "trafficking" could be considered a "particularly serious crime" that necessarily renders a person a "danger to the community." Indeed, even the federal government classifies nearly all first-time drug possession offenses as misdemeanors, 21 U.S.C. § 844(a)—a fact quite inconsistent with the suggestion that a simple possession conviction can be an "aggravated felony" and thus a "particularly serious crime."

A statute may not be construed in a manner that would put the United States in violation of its international treaty obligations unless its language unambiguously compels that result. *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Thus, to the extent that this statutory scheme is susceptible to more than one meaning, this doctrine provides an additional reason to adopt a reading that limits "aggravated felon[ies]" to drug crimes involving "illicit trafficking"—or, at the very least—that excludes state convictions for simple possession.

ARGUMENT

I. The United States has agreed to protect refugees from *refoulement* to persecution, and its statutes were intended to reflect that commitment.

Almost 40 years ago, the United States acceded to the Protocol Relating to the Status of Refugees. In so doing, the United States made a commitment to comply with the substantive provisions of Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees, developed in the aftermath of World War II. See *Immigration & Naturalization Serv.* v. *Stevic*, 467 U.S. 407, 416 (1984); JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 8 (rev. ed. 1998). The United States was actively involved in drafting the Convention and creating an international refugee protection regime to ensure the protection of those who flee persecution.[3]

Article 33 of the Convention is incorporated into the Protocol by reference and reproduction. The first paragraph of Article 33 "provides an entitlement for the subcategory [of refugees] that 'would be threatened' with persecution upon their return." *Immigration & Naturalization Serv.* v. *Cardoza-Fonseca*, 480 U.S. 421, 441 (1987). Specifically, the first paragraph states:

> No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion,

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[3] See Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session, Geneva, 14 August to 25 August 1950, at *http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.htm?tbl=PROTECTION&page=home&id=3ae68c248.*

> nationality, membership of a particular social group or political opinion.

PROTOCOL, art. 33, 19 U.S.T. 6223. This is commonly known as the protection of "non-*refoulement*." As the Secretary of State correctly explained when the Protocol was under consideration: "[F]oremost among the rights which the Protocol would guarantee to refugees is the prohibition (under Article 33 of the Convention) against their expulsion or return to any country in which their life or freedom would be threatened.'" *Stevic*, 467 U.S. at 428; see also CONVENTION, prbl. ¶ 2 (these provisions were intended to address the international community's "profound concern for refugees" and "to assure refugees the widest possible exercise of [their] fundamental rights and freedoms").

The second paragraph of Article 33 describes two narrow categories of refugees who are not entitled to this protection, in view of the danger they would present to the host country:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, ***or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country***.

Id. art. 33(2) (emphasis added).

Congress enacted the Refugee Act in 1980 for the primary purpose of bringing the United States into conformance with the language and requirements of the Protocol and Convention. See *Cardoza-Fonseca*, 480 U.S. at 436. The Act reaffirmed this Nation's commitment to "one of the oldest themes in [its] history—welcoming homeless refugees to our shores." S. Rep. No. 96-256, at 1 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 141.

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As part of that effort, Congress amended the Immigration and Nationality Act ("INA") to add the provision codifying the method by which a refugee can obtain asylum. 8 U.S.C. § 1158; see *Cardoza-Fonseca*, 480 U.S. at 423. The United States will recognize a refugee's status and her eligibility for asylum if she can prove that she has suffered from past persecution or has a "well-founded fear of future persecution" based upon race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42)(A).

Congress also amended the provision in the INA permitting refugees to terminate removal proceedings against them, providing that the Attorney General will not return any alien to a country if he concludes that the alien's life or freedom would be threatened because of persecution. *Stevic*, 467 U.S. at 409. This form of protection—known as "withholding of removal"—is mandatory (not discretionary) and is intended to codify the non-*refoulement* obligation under the Convention. See 8 U.S.C. 1231(b)(3)(A); *Stevic*, 467 U.S. at 421 (U.S. can meet its obligations under the Protocol by providing either asylum or withholding of removal to an alien who meets the definition of a refugee). Eligibility for withholding of removal requires a demonstration of a "clear probability" that the alien's life or freedom would be threatened. U.S.C. § 1231(b)(3)(A) & (b)(3)(B).[4]

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[4] The United States, in contrast to other parties to the Protocol, requires a higher standard of proof to establish entitlement to withholding of removal than the "well-founded fear" standard that defines a refugee under Article I of the Convention (and that is the standard for asylum under U.S. law). GUY S. GOODWIN-GILL, THE REFUGEE IN INT'L LAW 136, 138 (1996); *Stevic*, 467 U.S. at 428. Withholding of removal is mandatory for refugees who meet this higher threshold, whereas asylum is formally discretionary. U.S.C. § 1231(b)(3); 8 U.S.C. § 1158(b)(1); *see Stevic*, 467 U.S. at 4 *Cardoza-Fonseca*, 480 U.S. at 423.

In seeking protection in the U.S., refugees generally apply for both asylum and withholding of removal. There are important differences between these two types of relief, however. For example, an asylee can work without an employment authorization document and can obtain an unrestricted social security card. See U.S. Citizenship & Immigration Serv., *Types of Asylum Decisions*, *http://www.uscis.gov/graphics/services/asylum/types.htm#grant*. She may apply for a refugee travel document that will allow for travel abroad. See 8 C.F.R. § 223.1(b). And she may apply to adjust her status to that of legal permanent resident one year after receiving asylum, putting her on the path to U.S. citizenship. See 8 C.F.R. § 209.2(a). In addition, as recommended by the Final Act of the Conference that adopted the Convention, in order to preserve family unity, an asylee can apply for derivative asylum status for her spouse and minor children. 8 U.S.C. § 1158(b)(3).[5]

While a refugee who is granted withholding of removal will still be protected from deportation to her country of persecution, she could still be deported to another country. She is also not entitled to bring her spouse and children to safety in the United States or to any of the other benefits of asylum described above.

II. U.S. law bars a person convicted of a "particularly serious crime" from both asylum and withholding of removal, and it equates a "particularly serious crime" with an "aggravated felony" under the INA.

In the context of both asylum and withholding of removal, Congress added language that tracks the exception

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[5] See also UNHCR HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ch. VI (Reedited 1992) ("HANDBOOK") (attaching recommendation of the Final Act of the Conference).

in the second paragraph of Article 33. Thus it excepted any refugee who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community" from the benefits of both of these statutes. 8 U.S.C. § 1158(b)(2)(A)(ii); 8 U.S.C. § 1253(h)(2)(B), *repealed and recodified*, 8 U.S.C. § 1231(b)(3)(B)(ii) ("the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community").

Congress has generally equated "aggravated felony" with "particularly serious crime" under the INA. See 8 U.S.C. § 1101(a)(43); see also 8 U.S.C. § 1158(b)(2)(B)(i). "Aggravated felony," in turn, is defined by the INA as follows:

> * * * illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, U.S. Code).

8 U.S.C. § 1101(a)(43)(B). It is that definition that is at issue in these companion cases. As shown below, because an alien becomes ineligible to remain in the United States upon conviction of an "aggravated felony," this Court's interpretation of that term in this case will have dramatic implications for immigrants who face persecution if they are returned to their countries of nationality.

A. A person who commits an "aggravated felony" is automatically ineligible for asylum.

As noted above, the U.S. will recognize a refugee's status and her eligibility for asylum if she can prove that she has suffered from past persecution or has a "well-founded fear of future persecution" based upon race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42)(A).

A refugee who has committed an "aggravated felony" while in the United States, however, is automatically ineligible for a grant of asylum, notwithstanding her fear of persecution. See 8 U.S.C. § 1158(b)(2)(A)(ii) & (b)(2)(B)(i). As discussed above, Section 1158(b)(2)(A)(ii) of Title 8 provides categorically that asylum is not available to one convicted of a "particularly serious crime." That statute further provides that "an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime." 8 U.S.C. § 1158(b)(2)(B)(i). These provisions thus erect an automatic bar to asylum for anyone who has been convicted of an "aggravated felony."

The implications of this bar to asylum are grave. As discussed above, a grant of asylum carries with it a number of important rights and benefits that assist a refugee and her family to become integrated into American society, including the ability to work without an employment authorization document, to apply after one year to adjust her status to that of a legal permanent resident, and to apply for derivative asylum status for immediate family members. Under the Fifth and Eighth Circuits' reading of the relevant statutes, a refugee convicted of a single count of drug possession and sentenced to probation and a treatment program would be denied all of these important benefits of asylum, if she happened to live in a state that identifies such a crime as a felony.

B. A person who commits an "aggravated felony" is presumptively ineligible for withholding of removal.

A person who is not a U.S. citizen and lacks valid immigration status may be "removed" on that basis. Likewise, a person who has been granted legal status in this country, even a lawful permanent resident, can be "removed" if she engages in criminal conduct. As noted

above, however, a refugee will be entitled to "withholding of removal" if she can show that her life or freedom would be threatened upon her return on account of race, religion, nationality, membership in a particular social group, or political opinion. See 8 U.S.C. § 1231(b)(3)(A).

"Withholding of removal" is not available if the Attorney General decides that "the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States." 8 U.S.C. § 1231(b)(3)(B)(ii).[6] Although the statute itself does not define the term "particularly serious crime," the final clause of Section 1231(b)(3) provides:

> for purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from

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[6] The regulations implementing the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contain an identical exception barring "withholding of removal" for those convicted of "particularly serious" crimes. See 8 C.F.R. § 208.16(d)(2) (2001). Those convicted of "particularly serious crimes" do remain eligible for *deferral* of removal, which does not result in a grant of U.S. residency, does not necessarily result in a release from custody, and is subject to termination if the conditions change. See 8 C.F.R. § 208.17(a), (b)(i)-(iv). Furthermore, to establish eligibility for deferral of removal, an alien must establish that it is "more likely than not" she would be tortured by, or with the acquiescence of, government officials acting under color of law. *Id.* §§ 208.17(a), 208.18(a). Deferral of removal thus will not protect refugees who would face a probability of persecution in their home countries if that persecution does not meet the definition of "torture" or takes place without the requisite level of state involvement.

> determining that, notwithstanding the length of the sentence imposed, an alien has been convicted of a particularly serious crime.

8 U.S.C. § 1231(b)(3) (final clause).[7] Thus, by statute, a refugee convicted of an aggravated felony and sentenced to at least five years of imprisonment is ***automatically*** deemed to have committed a "particularly serious crime" that bars her from receiving "withholding of removal." *Matter of Y-L-*, 23 I&N Dec. 270, 273 (A.G. 2002).

If a state possession felony is deemed an "aggravated felony" under the statutes at issue here, even a refugee with a suspended sentence who serves little or no time could fall under this automatic bar to withholding of removal. See 8 U.S.C. § 1101(a)(48)(B (five-year threshold includes suspended sentences). For example, if petitioner Jose Antonio Lopez had otherwise been entitled to "withholding of removal," he would have been denied that protection under the automatic bar in light of his state felony conviction for aiding and abetting possession, for which he was sentenced to five years and yet served only 15 months. J.A. 22. Thus a refugee in his position could be returned to death or death in a country he had fled because of political, religious, or other persecution, solely because of a single possession conviction that entailed relatively little jail time.

For refugees with a total sentence of less than five years, the Attorney General has discretion to conclude that the "aggravated felony" is not a "particularly serious crime" and hence does not bar withholding of removal. *Tunis* v. *Gonzales*, 447 F.3d 547, 549 (7th Cir. 2006) (citing 8 U.S.C. § 1231(b)(3)(B)(ii)). Under the Attorney General's decision in

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[7] Prior law provided that *all* aggravated felonies constituted "particularly serious crime[s]." See 8 U.S.C. § 1253(h)(2) (1994). That provision was later eliminated and replaced by the current definition of "particularly serious crime" contained in the last clause of 8 U.S.C. § 1231(B)(3) (cited above).

Matter of Y-L-, however, drug offenses with a sentence of less than five years that are deemed to be "drug trafficking" aggravated felonies trigger a ***presumptive*** bar on withholding of removal, with very limited exceptions. Although the convictions before the Attorney General in that case actually involved evidence of "trafficking," the Government will likely apply the *Y-L-* presumption to any crime that falls within the definition of "drug trafficking crime" as that term is used in 8 U.S.C. § 1101(a)(43)(B). Based on the Government's position here, a state felony for simple possession would fall within that definition.

In the *Y-L-* case, the Attorney General concluded that such drug-related aggravated felonies presumptively constitute "particularly serious crimes" within the meaning of the statutes governing withholding of removal. 23 I&N Dec. at 274 (overruling *Matter of S-S-*, Interim Decision 3374 (BIA 1999), which invoked a case-by-case review to determine which crimes are "particularly serious"). He further concluded that only under the most "extraordinary and compelling" circumstances would departure from this interpretation be warranted or permissible. *Id.* He noted that, at a minimum, those circumstances would need to include ***all*** of the following criteria:

> (1) a very small quantity of the controlled substance;
>
> (2) a very modest amount of money paid for the drugs in the offending transaction;
>
> (3) merely peripheral involvement in the criminal activity, transaction, or conspiracy;
>
> (4) the absence of any violence or threat of violence, implicit or otherwise;
>
> (5) the absence of any organized crime or terrorist organization involvement, direct or indirect; and

> (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles.

Id. at 276-77.

According to the Attorney General, only if ***all*** of these criteria were present would it be appropriate to consider whether other, additional "unusual circumstances" justify departure from the presumption that drug-related aggravated felonies are "particularly serious." *Id.* at 277; *Tunis*, 447 F.3d at 449. Additionally, the Attorney General stated that facts such as "cooperation with law enforcement authorities, limited criminal histories, downward departures at sentencing, and post-arrest (let alone post-conviction) claims of contrition or innocence" do not justify deviation from the presumption. 23 I&N Dec. at 277.

To be sure, the *Y-L-* standard purports to create a rebuttable presumption and not a per se rule that drug-related aggravated felonies with sentences of less than five years are "particularly serious." See *Ford* v. *Bureau of Immigration & Customs Enforcement's Interim Field Office Director*, 294 F. Supp. 2d 655, 661-62 (M.D. Pa. 2003) (stating "[t]he Attorney General in *Matter of Y-L-* stopped short of creating a per se rule that all drug trafficking convictions constitute "particularly serious crimes"); 8 C.F.R. § 208.16(d)(3) ("[I]t shall be presumed that an alien convicted of an aggravated felony has been convicted of a particularly serious crime."). As a practical matter, however, the standard set out by the Attorney General in *Y-L-* is close to a complete bar on withholding of removal, simply because the exception is so narrow. Although a first-time simple possession offense with a sentence of less than five years might meet most or all of the *Y-L-* factors listed above, that fact alone would not guarantee that "withholding of removal" would be available under the terms of *Y-L-*.

As this discussion illustrates, this Court's interpretation of the term "aggravated felony" may have a significant impact on a refugee's ability to obtain asylum and to avoid *refoulement* to persecution in her home country. That impact cannot be ignored, particularly in light of the treaty issues to which we now turn.

III. The *Charming Betsy* doctrine compels a narrow reading of the definition of "aggravated felony."

This Court presumes that Congress intends its statutes to comply with the law of nations, unless the statute unambiguously states otherwise. "It has been a maxim of statutory construction since the decision in *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains * * * .'" *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982). Thus, a statute that is susceptible to more than one reading should be interpreted in a manner that avoids conflict with the international treaty obligations of the United States. This basic rule has been followed by this Court in a variety of contexts.[8]

The briefs submitted by other *amici* in these cases explain in detail why the definition of "aggravated felony" should be understood to include only those drug crimes that

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[8] *Weinberger*, 456 U.S. at 29-30, 32-33 (looking to international law in interpreting statute prohibiting employment discrimination against U.S. citizens on military bases overseas unless permitted by treaty); *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953) (in maritime tort case, looking to law of nations in determining statutory construction of Jones Act); *MacLeod* v. *United States*, 229 U.S. 416, 434 (1913) ("it should not be assumed that Congress proposed to violate the obligations of this country to other nations"); *Chew Heong* v. *United States*, 112 U.S. 536, 539-40 (1884) (interpreting immigration statute so as to avoid conflict with treaty right of Chinese alien to enter the United States).

actually involve *"illicit trafficking* in a controlled substance"—and, at the very least, why they cannot include state possession felonies that federal law would regard as only misdemeanors. To the extent that the definition of "aggravated felony" is also susceptible to a different meaning, however—and the Fifth and Eighth Circuits believe that it is—*Charming Betsy* dictates that it be interpreted in a manner consistent with the Nation's treaty obligations. As discussed below, interpreting the statute to encompass these types of simple possession crimes would put the United States in violation of its treaties relating to the status of refugees. There is no reason to believe that Congress intended such a result.

A. The U.S. cannot be in compliance with the Protocol if it denies protection to those convicted of an offense that it generally regards as a misdemeanor.

The prohibition against *refoulement* to persecution is one of the core principles of the Convention (and of international refugee law generally). According to the Convention's preamble, its purpose is to ensure that refugees enjoy the widest possible exercise of the fundamental rights and freedoms guaranteed to all people. CONVENTION, prbl. ¶ 2. As discussed above, Article 33(1) of the Convention states that: "[n]o Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

Thus Article 33(1) affirms the basic principle that a person must not be removed from his country of refuge and sent back to a place where his life or freedom would be jeopardized. And the "particularly serious crime" exception of Article 33(2) creates only a very limited exception to the

fundamental right to non-*refoulement*.[9] See James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT'L L.J. 257, 293 (2001) (Article 33(2) authorizes *refoulement* to persecution only where it is necessary to protect the community in the host nation from an unacceptably high level of danger).

There can be no doubt that the United States would run afoul of its promise to protect all refugees except those who have committed a "particularly serious offense" if it were unwilling to protect those who were convicted of a crime punished as a misdemeanor under federal law. The United States' own controlled substances statutes thus provide the best evidence that a simple possession offense cannot be "particularly serious" for purposes of the Convention.

In general, federal law punishes the crime of drug possession only as a misdemeanor. See 21 U.S.C. § 844(a) ("Penalties for Simple Possession") (punishment is limited to less than one year unless other circumstances are present, as where the offender has been convicted of a similar crime before or where the drug is of a significant quantity and includes cocaine base); 18 U.S.C. § 3559(a)(6). Indeed, if a person is convicted of possessing a controlled substance in violation of 21 U.S.C. § 844 and has no previous drug-related convictions, "the court may, with the consent of such person, place him on probation for a term of not more than one year ***without entering a judgment of conviction.***" 18 U.S.C. § 3607(a) (emphasis added). Allowing a first-time offender to escape entry of a judgment of conviction for a

[9] In the record of proceedings connected with the adoption of Article 33(2), the U.S. delegate explained that "it would be highly undesirable to suggest in the text of [Article 33] that there might be cases, even highly exceptional cases, where a man might be sent to death or persecution." CONVENTION, *travaux préparatoires*. See Factum of the Intervenor, UNHCR, *Suresh* v. *Minister of Citizenship & Immigration*, S.C.C. No. 27790, at ¶ 63 (Mar. 8, 2001), *reprinted at* 14 INT'L J. REFUGEE L. 141.

crime is hardly consistent with the suggestion that that crime is "particularly serious" for purposes of the Protocol.

Congress's use of the term "serious" in other related contexts is also instructive. The offenses Congress identifies under its definition of "serious drug offense" in the main penalty provision under the Criminal Code involve either actual trafficking, participation in a continuing criminal enterprise, importing or exporting, or possession ***with the intent*** to "manufacture, distribute, or dispense" a controlled substance. See 18 U.S.C. § 3559(c)(2)(H) (citing 21 U.S.C. §§ 841(b)(1)(A), 848, 960(b)(1)(A)). Moreover, Congress penalizes those who commit a "serious drug offense" with a sentence of 10 years to life. 18 U.S.C. § 3559(c)(2); see also 18 U.S.C. § 924(e)(2)(A) (a "serious drug offense" is defined as a federal offense with a maximum sentence of 10 years or more, or a state offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute" with a maximum sentence of 10 years or more). By contrast, the maximum sentence for simple possession of any drug other than cocaine base is only three years, even for repeat offenders. See 21 U.S.C. § 844(a).

The structure of the "particularly serious crime" provisions in U.S. law also supports the view that Congress could not have intended to make every simple possession felony an "aggravated felony" for purposes of the INA. Article 33(2)'s exception applies, in relevant part, to anyone "who, having been convicted by a final judgment of a particularly serious crime, ***constitutes a danger to the community of that country.***" CONVENTION art. 33(2) (emphasis added). The statutory scheme that Congress enacted to implement that exception has been interpreted to begin and end with whether the person committed a "particularly serious crime," without any case-by-case determination of "dangerousness." See, *e.g.*, *Urbina-Mauricio* v. *Immigration & Naturalization Serv.*, 989 F.2d 1085 (9th Cir. 1993) ("once a court has determined than an alien has been

convicted of a particularly serious crime, it need not make a separate finding that the alien constitutes a danger to the community; the latter follows naturally from the former"); *Matter of C.*, 20 I&N 529 (BIA 1992) (rejecting proposed two-step inquiry that would include a separate assessment of dangerousness).[10] Thus Congress presumably limited the terms "particularly serious crime" and "aggravated felony" to include only those crimes that it believed necessarily create a high risk of "danger to the community." It would be inconsistent with that presumption to interpret the definition of "aggravated felony" to include the crime of possessing a small quantity of drugs for personal use.

By definition, the term "particularly serious crime" cannot include an offense that Congress does not even regard as "serious." And given that the statutes have been found not to require a separate determination of "dangerousness," Congress must have intended the categories of "aggravated felony" and "particularly serious crime" to include only those crimes that necessarily pose a significant risk of danger to the community. For both of these reasons, to interpret the definition of "aggravated felony" to include all felony convictions for simple possession would put the United States in conflict with the Protocol, based upon the United States' own standards for the relative seriousness of crimes.

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[10] This itself is a departure from the international standard. James C. Hathaway & Anne K. Cusick, *Refugee Rights Are Not Negotiable*, 14 GEO. IMMIGR. L.J. 481, 537-38 (2000) ("Under the international standard, conviction by final judgment of a particularly serious crime is a necessary, but not sufficient, condition for removal.").

B. UNHCR materials confirm that a "particularly serious crime" is one of extreme gravity.

Although the Protocol and Convention do not define "particularly serious," the U.N. High Commissioner on Refugees ("UNHCR") has provided guidance as to what types of criminal convictions could legitimately allow an exception to the obligation of non-*refoulement*.[11] Those materials demonstrate that a simple possession offense could not possibly qualify as a "particularly serious crime" that renders a person "a danger to the community" without further inquiry.

For example, the exceptions in Article 33(2) are discussed in the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. While the Handbook does not have the force of law, it does "provide significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes." *Immigration & Naturalization Serv.* v. *Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987). As relevant here, the Handbook highlights the fact that Article 33 permits a refugee's expulsion only in "extreme cases." HANDBOOK ¶ 154.

Indeed, the "particularly serious crime" exception in Article 33(2) is even narrower than Article 1(F) of the Convention, which states that the Convention does not apply "to any person with respect to whom there are serious

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[11] The UNHCR was created in the wake of World War II to coordinate international action for the world-wide protection of refugees. Its primary purpose is to safeguard the rights and well-being of refugees. The U.S. is a member of the Executive Committee of the UNHCR.

reasons for considering that * * * he has committed a *serious non-political crime* outside the country of refuge prior to his admission to that country as a refugee." CONVENTION art. 1(F)(b) (emphasis added).[12] As the Handbook explains, "a 'serious' crime must be a capital crime or a very grave punishable act" to fall within Article 1(F). HANDBOOK ¶ 155. "Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1(F)(b)." *Id.* Obviously, a "***particularly*** serious crime" would need to be a crime that is even more grave than those "serious crimes" that fall under Article 1(F). See UNCHR Comments on Proposed Rules on "Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens: Conduct of Removal Proceedings; and Asylum Procedures," at *http://www.usaforunhcr.org* (Feb. 4, 1997) ("A 'particularly serious crime' would be an even more restrictive category" than the category of "serious" crimes to which Article 1(F) refers); accord *Matter of Frentescu*, 18 I&N 244 (BIA 1982) (recognizing that a particularly serious crime is more serious than a serious non-political crime).

Another source of guidance is the UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees ("GUIDELINES").[13] This document also

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[12] The history of these provisions confirms their relationship, as the discussions at the Conference of Plenipotentiaries specifically made note of the link between Article 33(2) and what was eventually to become Article 1F. GUNNEL STENBERG, NON-EXPULSION AND NON-REFOULMENT: THE PROHIBITION AGAINST REMOVAL OF REFUGEES WITH SPECIAL REFERENCE TO ARTICLES 32 AND 33 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEE at 224 (1989). Therefore, Article 1(F) can aid how Article 33(2) is interpreted. See *id.*

[13] See *Castillo-Arias* v. *U.S. Atty. Gen.*, 446 F.3d 1190, 1197 (11th Cir. 2006) ("Reference to the UNHCR Guidelines * * * is permissible because the U.S. Supreme Court has held that Congress intended

discusses the exceptions in Article 33(2). The Guidelines emphasize that only individuals who commit "particularly grave crimes" are subject to the second exception in Article 33(2). GUIDELINES ¶ 16. Further, the Guidelines explain that "Article 33(2) concerns the future risk that a recognised refugee may pose to the host state." *Id.* ¶ 4.

Again, Congress presumably intended its statutory scheme to comply with Article 33(2) and to be limited to such "particularly grave crimes." Obviously, a simple possession conviction—without any evidence of involvement in trafficking or other aggravating circumstances—could not possibly meet that definition.

C. U.S. treaties relating to controlled substances also support the conclusion that simple possession cannot be a "particularly serious crime."

The treaties that relate to drug trafficking further suggest that simple possession cannot be a "particularly serious" crime under international law. The United States is party to a number of treaties on narcotics, including the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("Trafficking Convention"). See Martin Gottwald, *Asylum Claims and Drug Offences: The Seriousness Threshold of Article 1F(B) of the 1951 Convention Relating to the Status of Refugees and the UN Drug Conventions*, 8 INT'L J. REFUGEE L. 81, 93 (2006) (comparing provisions of the drug conventions with provisions of the Convention Relating to the Status of Refugees). "The cornerstone of the Trafficking Convention is Article 3 on 'Offences and Sanctions,' which distinguishes between 'criminal offences' (Art. 3.2), 'serious criminal offences' (Art. 3.1 and Art. 3.7)

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to conform United States refugee law with the 1967 United Nations Protocol Relating to the Status of Refugees."); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (noting the UNHCR's "analysis provides significant guidance for issues of refugee law").

and 'particularly serious offences' (Art. 3.5)." Gottwald, *supra*, at 94. It is Article 3.2 of this Convention that requires signatory nations to criminalize simple possession offenses, within the limits of their own constitutional law, whereas the other paragraphs of that article pertain to the actual sale and distribution of drugs. See TRAFFICKING CONVENTION, *supra*, art. 3. Under the Trafficking Convention, then, simple possession is categorized only as a "criminal offence" and not as a "particularly serious" or even "serious" offense.

Indeed, the Convention sets out a long list of factors to be considered before even a true drug distribution offense becomes "particularly serious." See TRAFFICKING CONVENTION, *supra*, art. 3.5 ("The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of the offences established in accordance with paragraph 1 of this article particularly serious * * * ."). Those factors may include the involvement of international organized crime; the involvement of the offender in other illegal activities facilitated by commission of the offense; the use of violence or arms; the fact that the offender holds a public office and that the offense is connected with the office in question; and the victimization or use of minors. *Id.* If even the distribution of narcotics is not "particularly serious" without facts such as these, then surely a simple possession offense cannot be considered "particularly serious."

CONCLUSION

In light of the implications of the issue for refugees and for the Nation's compliance with its international treaty obligations regarding refugees, *Amicus* urges this Court to reverse the decisions of the Fifth and Eighth Circuits and to adopt a narrow reading of the "aggravated felony" definition that excludes convictions for simple possession. At the very least, the definition must exclude state

possession offenses that would be considered misdemeanors under federal law.

Respectfully submitted.

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No. 05-7664

In the Supreme Court of the United States

REYMUNDO TOLEDO-FLORES, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AND FAMILIES AGAINST MANDATORY MINIMUMS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether 18 U.S.C. § 924(c)(2)'s definition of "drug trafficking crime" includes only those offenses punishable as felonies under the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*

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U.S. Sentencing Commission, *1999 Sourcebook of Federal Sentencing Statistics*. 9
U.S. Sentencing Commission, *2003 Sourcebook of Federal Sentencing Statistics*. 9

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Office of Immigration Statistics, U.S. Dep't of Homeland Security, *2003 Yearbook of Immigration Statistics, available at* http://uscis.gov/graphics/shared/aboutus/statistics/2003Yearbook.pdf..... 7

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Federal Defenders was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, nonprofit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of the Association is to promote the fair adjudication of justice by appearing as *amicus curiae* in litigation relating to criminal-law issues, particularly as those issues affect indigent defendants in federal court. The Association has appeared as *amicus curiae* in litigation before the Supreme Court and the federal courts of appeals.[2]

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[1] Pursuant to Rule 37.6, Amici Curiae certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of the Court.

[2] Published decisions in which the Association has appeared as *amicus curiae* in this Court include *Castillo v. United States*, 530 U.S. 120 (2000); *United States v. Arvizu*, 534 U.S. 266 (2002); *United States v. Vonn*, 535 U.S. 55 (2002); *Massaro v. United States*, 538 U.S. 500 (2003); *United States v. Booker*, 543 U.S. 220 (2005); *Dodd v. United States*, 545 U.S. 353 (2005); and *United States v. Grubbs*, 126 S. Ct. 1494 (2006).

Families Against Mandatory Minimums Foundation (FAMM) is a nonprofit, nonpartisan organization with 10,000 members and thirty chapters nationwide. FAMM does not oppose imprisonment, but urges that punishment be proportionate to the offense and the culpability of the offender. FAMM conducts research, promotes advocacy, assists prisoners with securing *pro bono* counsel, and educates the public regarding the excessive cost of mandatory sentencing. That cost is not limited to public expenditures but includes the perpetuation of unwarranted sentencing disparities, disproportionate sentences, and the increasing reliance on lengthy periods of incarceration to the detriment of other responses to crime. FAMM is deeply interested in ensuring that prisoners spend no more time incarcerated than that authorized by law.

Amici Curiae file this brief because Petitioner Toledo-Flores's case[3] raises an important question of statutory construction that will impact sentencing for many indigent federal defendants. That question potentially turns upon the application of the rule of lenity. Amici Curiae offer their view as to the role the rule of lenity could play in the resolution of this question.

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[3] Amici Curiae submit this brief on behalf of Petitioner Toledo-Flores. His case has been consolidated for purposes of oral argument with *Lopez v. Gonzales*, No. 05-547.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question in this case primarily concerns the portion of 18 U.S.C. § 924(c) that defines a "drug trafficking crime" as "any felony punishable under the Controlled Substances Act . . . ." 18 U.S.C. § 924(c)(2). The lower courts have split as to whether the term "felony" therein refers only to offenses punishable as felonies under federal law (the Federal Felony Approach) or whether it extends to all offenses punishable as felonies under state law, including those for simple possession of drugs (the State Felony Approach). *Compare, e.g., United States v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005), *with United States v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997).

Amici Curiae believe that the plain language of § 924(c)(2) reaches only felonies under federal law, as the petitioners and other *amici* have explained. And, at the very minimum, the statute forecloses the State Felony Approach adopted by the Fifth Circuit. Because these arguments are clear and the meaning of the statute is unambiguous, no purpose would be served by revisiting those points here. Amici Curiae focus instead on the rule of lenity. Here, as it often does, lenity serves as a secondary argument showing why the Court, even if it were to decide that the statute is ambiguous, cannot adopt the Government's harsher interpretation of the statute.

The rule of lenity is deeply rooted in our justice system, ensuring that fair notice is given, that laws are not enforced

arbitrarily, and that the executive, legislative and judicial branches maintain their proper roles. To satisfy the rule of lenity and its underlying concerns, the Court should reject the Government's argument for the State Felony Approach. Thousands of potentially affected individuals have been given actual notice of a contrary interpretation by the Government. The State Felony Approach is counterintuitive and impermissibly depends in part on intimations as to general legislative policy rather than the specific question of statutory construction. Applying the rule of lenity will avoid reliance on anything but the clear meaning of the legislation, and will allow for uniform, nationwide application of 18 U.S.C. § 924(c), 8 U.S.C. § 1101(a)(43)(B), and U.S. Sentencing Guideline § 2L1.2.[4]

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[4] Although it is not necessary for the Court to reach the issue to resolve the case of either petitioner, Amici Curiae note that the pertinent federal statutes should not be construed to reach *every* state drug offense that could be punished as a felony under federal law. As explained in other briefs before the Court, the Immigration and Nationality Act's term "aggravated felony" encompasses only state drug offenses that (1) are felonies and (2) include an element of trafficking. Amici Curiae fully support that interpretation and believe that the rule of lenity requires its adoption.

ARGUMENT

ANY AMBIGUITY IN THE STATUTE MUST BE RESOLVED IN THE PETITIONER'S FAVOR USING THE RULE OF LENITY

Section 924(c) of Title 18 of the United States Code defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act . . . ." 18 U.S.C. § 924(c)(2). Petitioner Toledo-Flores persuasively argues that the plain language of this definition does not reach a state felony conviction for the simple possession of drugs. Should the Court find the statute ambiguous, however, the rule of lenity requires that it be construed in Petitioner Toledo-Flores's favor. Lenity will defeat the inconsistent interpretations that have been urged by the Government and adopted by the lower courts, and it will ensure uniform, nationwide application of the statute in all contexts.

A. Section 924(c)'s term "drug trafficking crime" has a long and troublesome history of inconsistent interpretation.

Since 1990, interpretation of the phrase "drug trafficking crime" has vacillated between two inconsistent readings. The first reading — the Federal Felony Approach[5] — interprets the term in its native context of

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[5] Courts have sometimes called this the "Hypothetical Federal (continued...)

Title 18 and section 924(c). Under this approach, a conviction for simple possession of drugs will qualify as an aggravated felony only if it is punishable as a felony under the designated federal laws. The second reading — the State Felony Approach — expands Title 18's "drug trafficking crime" by cross-referencing a definition of "felony" found in Title 21. *See* 21 U.S.C. § 802(13). Under that approach, a conviction for simple possession will be a drug trafficking crime (and an aggravated felony) whenever the offense involves a federally prohibited drug and is classified as a felony by the state.

The vacillation between these approaches was in large part fostered by the Government, which endorsed the Federal Felony Approach in the immigration context while urging the State Felony Approach in the criminal sentencing context. Eventually, the case law splintered, with some circuits interpreting the statute differently depending on the context in which it arose. Such inconsistency has led to disparate treatment for thousands of persons facing deportation or imprisonment. It could lead even to disparate treatment of the same person, depending on the stage of litigation she faces. And while the courts have more recently tried to interpret the statute based on its text, serious problems of inconsistency remain.

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[5] (...continued)
Felony Approach," *see, e.g.*, *United States v. Palacios-Suarez*, 418 F.3d 692, 695 (6th Cir. 2005), but the shortened label will be used here.

1. The Government-fostered interpretive split.

In a series of immigration cases from 1990 to 1995, the Board of Immigration Appeals adopted the Federal Felony Approach. *Matter of Barrett*, 20 I. & N. Dec. 171 (BIA 1990); *Matter of Davis*, 20 I. & N. Dec. 536 (BIA 1992); *In re L– G–*, 21 I. & N. Dec. 89 (BIA 1995).[6] The United States Attorney General had the authority to *sua sponte* overrule *In re L– G–* and to adopt the State Felony Approach. 8 C.F.R. § 3.1(h) (1995); *see, e.g., Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 288 (A.G. 1991) (reversing BIA and issuing binding precedent where "no plausible understanding" of the law would support BIA's decision). The Attorney General could also have appealed the decision to federal court. *See Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996). The Attorney General did neither. *See id.* Instead, the Attorney General let stand the Federal Felony Approach, and, based on that interpretation, the Department of Justice processed thousands of aliens nationwide.[7]

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[6] This interpretation took a fully nationwide effect when the Second Circuit, in light of *In re L– G–*, changed course and adopted the Federal Felony Approach in the immigration context. *Aguirre v. INS*, 79 F.3d 315, 318-19 (2d Cir. 1996).

[7] Almost 80,000 people were deported in fiscal year 2003 on crime-related grounds. Office of Immigration Statistics, U.S. Dep't of Homeland Security, *2003 Yearbook of Immigration Statistics* 165, Table 43, *available at* http://uscis.gov/graphics/shared/aboutus/statistics/2003Yearbook.pdf.

Federal prosecutors nevertheless argued for the State Felony Approach in criminal cases turning upon precisely the same question of statutory interpretation resolved in the immigration context.[8] This strategy succeeded in the First Circuit, the first court of appeals to consider the issue after the BIA had adopted the Federal Felony Approach. *See United States v. Restrepo-Aguilar*, 74 F.3d 361, 363 (1st Cir. 1996). The court addressed § 924(c)(2) in the context of the "aggravated felony" definition of 8 U.S.C. § 1101(a)(43)(B) and U.S. Sentencing Guideline § 2L1.2. The court adopted the State Felony Approach. *Id.* at 364. Referring to *dicta* from prior decisions, it held, "We adhere to this established interpretation and reject the defendant's contrary construction." *Id.* at 364.[9] The court did not address the rule of lenity, or the Attorney General's decision to let stand *In re L– G–*.

After becoming an "established interpretation," the First Circuit's *dicta* snowballed. The next four circuits to rule on the issue in the § 2L1.2 context followed the First Circuit. *United States v. Cabrera-Sosa*, 81 F.3d 998, 1000 (10th Cir. 1996); *United States v. Briones-Mata*, 116 F.3d 308, 309 (8th Cir. 1997); *United States v. Hinojosa-Lopez*, 130 F.3d 691, 694 (5th Cir. 1997); *United States v. Simon*,

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[8] The interpretation of § 924(c)(2) must be the same regardless whether the question arises in the immigration or criminal context. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *see generally United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992).

[9] *See In re L– G–*, 21 I. & N. Dec. at 97 n.5 (explaining the First Circuit's *dicta*).

168 F.3d 1271, 1272 (11th Cir. 1999). None of those circuits offered an independent or close analysis of the text interpreted; none addressed the Attorney General's decision to let stand the Federal Felony Approach in immigration cases; and none mentioned the rule of lenity. The inconsistency between the immigration cases and the criminal sentencing cases deepened in *United States v. Pornes-Garcia*, where the Second Circuit, which had adopted the Federal Felony Approach in the immigration context, decided to follow the State Felony Approach in the criminal context, despite the intracircuit incongruity it would create. 171 F.3d 142, 147 (2d Cir. 1999). And each year, the inconsistency affected more defendants, as the number of individuals sentenced under § 2L1.2 grew exponentially.[10]

2. The consequences of the entrenched immigration/criminal split.

As a result of the disparate interpretations endorsed by the Government, a consequential split developed. In the immigration context, the Federal Felony Approach was applied nationwide. But in the criminal context, the State Felony Approach had been adopted by five circuits. Thus,

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[10] *Compare* U.S. Sentencing Comm'n, *1992 Annual Report*, Table 24 (711 defendants sentenced under § 2L1.2), *with* U.S. Sentencing Comm'n, *1999 Sourcebook of Federal Sentencing Statistics*, Table 17 (5,658 such defendants). By recent figures, over one-fifth of all federal prison sentences are imposed on defendants convicted of immigration offenses. U.S. Sentencing Comm'n, *2003 Sourcebook of Federal Sentencing Statistics*, Table 3, Figure A.

for example, an alien with a state felony conviction for simple possession could be advised in immigration proceedings culminating in deportation that her prior conviction *was not* an aggravated felony.[11] But if that same alien returned to the United States and was, like Petitioner Toledo-Flores, prosecuted for illegal reentry, then she was likely to receive a longer sentence based on the conclusion that the very same simple possession conviction *was* an aggravated felony. That is, this individual would likely be subjected to a much longer sentence at the behest of a Department of Justice official whose position directly conflicted with that of the last Department official to advise and act upon her.

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[11] Although an aggravated felony is often a basis for deportation, there are several specific situations in which a deported alien could have been advised by an immigration judge or official that his or her prior simple possession conviction was *not* an aggravated felony. For example, this could occur when: (1) the immigration judge or official decided that a prior simple possession conviction was not an aggravated felony and thus not a bar to applying for a discretionary waiver to deportation, yet the alien was ultimately denied the waiver, *see* 8 U.S.C. § 1229b(a); (2) the immigration judge or official decided a prior simple possession conviction was not an aggravated felony and thus not a bar to applying for asylum, yet the alien was ultimately denied asylum, *see id.* § 1158(a); or (3) the immigration judge or official decided that a prior simple possession conviction was not an aggravated felony and thus did not trigger automatic pre-hearing detention on that basis, yet the alien was ultimately deported, *see id.* § 1226(c)(1)(B).

3. The trend towards textualism and leniency.

Beginning with Judge Canby's dissent in *United States v. Ibarra-Galindo*, 206 F.3d 1337, 1343 (9th Cir. 2000), federal courts have performed a closer reading of the statutory text when interpreting § 924(c)(2). Most of these courts have either rejected the State Felony Approach, *see Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004); *United States v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005); *Gonzales-Gomez v. Achim*, 441 F.3d 532 (7th Cir. 2006); or, at times constrained by precedent, they have limited its application, *see United States v. Robles-Rodriguez*, 281 F.3d 900 (9th Cir. 2002); *Liao v. Rabbett*, 398 F.3d 389 (6th Cir. 2005); *United States v. Amaya-Portillo*, 423 F.3d 427, 435-36 (4th Cir. 2005). *But see United States v. Wilson*, 316 F.3d 506 (4th Cir. 2003) (adopting State Felony Approach); *Lopez v. Gonzales*, 417 F.3d 934 (8th Cir. 2005) (applying its previously-adopted State Felony Approach in immigration context), *cert. granted*, 126 S. Ct. 1651 (2006). In a case arising in the criminal context, Judge Nelson opined that the rule of lenity should decisively resolve the question in favor of the defendant. *Palacios-Suarez*, 418 F.3d at 702 (Nelson, J., concurring).

B. The rule of lenity and its underlying principles.

The rule of lenity provides that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States v. Bass*, 404 U.S. 336, 348 (1971). Or, in the context of determining the

proper punishment under a statute, "[w]here it is doubtful whether the text includes the penalty, the penalty ought not be imposed." *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring); *see also Commissioner v. Acker*, 361 U.S. 87, 91 (1959) (stating that "one is not to be subject to a penalty unless the words of the statute plainly impose it") (internal quotations omitted).

Lenity has profound implications for the interpretive process because it derives from the principle of legality itself — *nulla poena sine lege* ("there can be no punishment without law"). *See generally* Herbert L. Packer, *The Limits of the Criminal Sanction* 93 (1968) (describing the rule of lenity and the vagueness doctrine as "devices worked out by the courts to keep the principle of legality in good repair"); *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (stating that enforcement of overly vague criminal statutes "violates the first essential of due process of law"). As explained below, lenity's underlying principles necessarily inform the interpretation of penal statutes, and they promote consistency and fairness in the application of the criminal code.

1. The roots of the venerable rule.

The rule of lenity has been called "venerable" because of its age and the respect it commands. *See R.L.C.*, 503 U.S. at 305; *see generally Rogers v. Tennessee*, 532 U.S. 451, 467-68 (2001) (Scalia, J., dissenting) (noting that "the maxim *nulla poena sine lege* . . . 'dates from the ancient Greeks' and has been described as one of the most 'widely

held value-judgments in the entire history of human thought'") (brackets omitted). Blackstone commented on the vigorous role it played in limiting criminal punishment in sixteenth- and seventeenth-century English courts. William Blackstone, *Commentaries on the Laws of England* 88. He described the rule as one of strict construction: "Penal statutes must be construed strictly." *Id.*

The rule of strict construction emerged in American courts in *United States v. Wiltberger*, 18 U.S. 76 (1820), which bears some resemblance to the instant case because in both cases the government sought a broad interpretation of the term in question based on a cross-reference to a distinct statutory provision. Chief Justice John Marshall stated that it was an "extreme improbability" that Congress did *not* intend for the meaning based on the cross-reference. *Id.* at 105. Yet, writing for the Court, he rejected the government's argument. The Chief Justice instead adhered to the rule of strict construction, explaining that the rule's underlying policies required a narrow, consistent interpretive approach to penal statutes:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It

> is the legislature, not the Court, which is to define a crime, and ordain its punishment.

Id. at 95. The Chief Justice acknowledged the courts' natural temptation to apply a statute in a way believed best to achieve the statute's policy, despite textual limitations. But yielding to such temptation did not provide persuasive authority. To the contrary, if such an interpretive maneuver had been executed previously, it must have been "in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases." *Id.* at 96.

In *McBoyle v. United States*, 283 U.S. 25 (1931), Justice Oliver Wendell Holmes emphasized the fair-notice rationale for the rule. Such notice must be provided even if defendants did not actually read the United States Code:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

Id. at 27. Justice John Marshall Harlan II reiterated this point thirty-five years later. "The policy thus expressed [by the rule of lenity] is based primarily on a notion of fair

play: in a civilized state the least that can be expected of government is that it express its rules in language all can reasonably be expected to understand." *United States v. Standard Oil Co.*, 384 U.S. 224, 236 (1966) (Harlan, J., dissenting).

2. The rule's purposes in modern criminal jurisprudence.

Modern cases recognize that the rule of strict construction — now known as the rule of lenity — has three fundamental purposes: "to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts." *United States v. Kozminski*, 487 U.S. 931, 952 (1988). Each of these purposes is essential to the proper functioning of our criminal justice system.

The first purpose is to ensure fair notice. Warning must be given "'to the world in language that the common world will understand.'" *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle*, 283 U.S. at 27). And although it is typically fictitious to assume that wrongdoers read statutes, fair notice is nevertheless "required in any system of law." *See United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring). Indeed, as explained above, fair notice is closely tied to the principle of legality itself.

Two ramifications stem from this need for fair notice. First, a premium is put on the commonsense meaning of a statute. *See, e.g., McBoyle*, 283 U.S. at 27. It is inherently unfair to impose on "the common world" a statutory interpretation that is overly obscure or clever. Second, a premium is put on the text itself. Judges should not rely on extratextual considerations to construe an unclear criminal statute against a defendant. "Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Crandon v. United States*, 494 U.S. 152, 160 (1990). The rule of lenity "preclude[s] our resolution of [an] ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history." *Hughey v. United States*, 495 U.S. 411, 422 (1990).[12]

Lenity's second purpose is to preserve the separation of powers. *See Bass*, 404 U.S. at 348. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Id.* "This policy embodies the

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[12] There has been debate within the Court as to whether the rule of lenity should play its decisive role before or after recourse to legislative history. *See R.L.C.*, 503 U.S. at 306 n.6 (plurality opinion). Amici Curiae believe that this question regarding the rule's precise relationship to legislative history need not be resolved here because, as argued in the principal brief, legislative history strongly supports the less harsh interpretation.

instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *Id.* (citation omitted). "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think, perhaps along with some Members of Congress, is the preferred result. . . . This admonition takes on a particular importance when the Court construes criminal laws." *United States v. Granderson*, 511 U.S. 39, 68-69 (1994) (Kennedy, J., concurring) (internal citations omitted). Lenity prevents the imposition of punishments that are not clearly authorized by Congress, the only branch of government competent to establish criminal penalties.

Lenity's third purpose is to avoid arbitrariness and inconsistency in the enforcement of criminal statutes. *See Kozminski*, 487 U.S. at 952. The rule of lenity responds to this need by "fostering uniformity in the interpretation of criminal statutes." *Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting). It fosters uniformity because, in each case of criminal statutory interpretation, it requires courts to examine the text for ambiguity and to resolve any such ambiguity in the same direction. *See generally id*; *Crandon*, 494 U.S. at 175-78 (Scalia, J. concurring); William N. Eskridge, Jr., *Formalism and Statutory Interpretation*, 66 U. Chi. L. Rev. 671, 678-79 (1999) (suggesting that adherence to the rule of lenity could "generate greater objectivity and predictability in statutory interpretation"). Faithfully applied, the rule of lenity prevents the sovereign from punishing individuals

based on an innovative or less-than-unambiguous reading of the criminal code.

C. By its own actions, the Government has effectively conceded that its current interpretation is not clear enough to survive application of the rule of lenity.

As explained at the outset, Amici Curiae do not believe that the definition of "drug trafficking crime" in 18 U.S.C. § 924(c)(2) is ambiguous. The definition is clouded only if one chooses to cross-reference the definition of "felony" found in Title 21. That cross-reference is improper. *Gerbier v. Holmes*, 280 F.3d 297, 309-10 (3d Cir. 2002); *United States v. Palacios-Suarez*, 418 F.3d 692, 698 (6th Cir. 2005); *Gonzales-Gomez v. Achim*, 441 F.3d 532, 534 (7th Cir. 2006). Even if it were permitted, however, any ambiguity would have to be resolved under the rule of lenity by adopting the reasonable interpretation most favorable to Petitioner Toledo-Flores. This favorable interpretation is particularly appropriate here, as it avoids the unfairness occasioned by the Government's inconsistent applications of the statute.

In past cases, this Court has noted government equivocation when resorting to the rule of lenity. *See, e.g.*, *Simpson v. United States*, 435 U.S. 6, 14-16 (1978); *Prince v. United States*, 352 U.S. 322, 327 n.7, 329 (1957). In *Simpson*, the Court found it significant that the Department of Justice had originally directed its attorneys to apply a more lenient interpretation, which the government then

argued against in the case before the Court. 435 U.S. at 16. Similarly in *Prince*, the Court found it significant that in a previous case the government had conceded that the harsh interpretation it presently sought was erroneous. 352 U.S. at 327 n.7.

This case presents a similar scenario. Contrary to its position before this Court, the Government previously has accepted the Federal Felony Approach as a reasonable interpretation. The Attorney General declined to reverse or appeal the BIA's decision in *In re L– G–*, thereby permitting immigration cases nationwide to be adjudicated based on the Federal Felony Approach. Federal prosecutors nevertheless sought application of the State Felony Approach at criminal sentencings. Such inconsistent actions were contrary to the rule that the same statutory provision must be given the same meaning in immigration and criminal contexts. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *see generally United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992). But they were also a tacit acknowledgment that the BIA's interpretation was reasonable — and thus that there was at least enough ambiguity for the rule of lenity to resolve the question in a defendant's favor.[13]

The Government's inconsistent interpretations also strengthen the practical argument for applying the rule.

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[13] Notably, a rule of lenity exists in immigration law that is similar to the criminal rule. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

Typically, the concern for fair notice has weight only in the abstract because it rests on the necessary fiction that offenders read statutes. *See McBoyle v. United States*, 283 U.S. 25, 27 (1931); *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring). But in this case, the fair-notice problem is concrete. Many defendants similarly situated to Petitioner Toledo-Flores received actual notice from the Department of Justice in the course of deportation proceedings that their prior simple possession convictions were *not* aggravated felonies. Yet when they reenter the United States, these defendants face harsher penalties based on the opposite conclusion.

Accordingly, the fair-notice concern must weigh especially heavily in favor of Petitioner Toledo-Flores. While it is fundamentally unfair to punish an individual in a way that a statute does not clearly provide, it is even worse to impose that punishment when the Executive deliberately has given actual notice of, and has adjudicated thousands of cases under, a contrary interpretation of the statute. *See generally United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 674 (1973) ("Thus, to the extent that the [administrative] regulations [stating a contrary interpretation of the law] deprived PICCO of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution."); *Raley v. Ohio*, 360 U.S. 423, 438 (1959) (reaching a similar conclusion).

D. The Government's interpretation subverts the rule of lenity and its underlying principles.

1. The Court should avoid an interpretation of a criminal statute harsher than that grasped by commonsense.

Because it is important for criminal statutes to speak in a language that the "common world" understands, Petitioner Toledo-Flores's argument concerning the commonsense meaning of "drug trafficking crime" carries special weight. Under the Government's view, a drug trafficking crime is committed by a person who possesses even the smallest amount of a drug whenever the State labels the offense a felony. This proposition is counterintuitive. The commonsense meaning of "traffic" is not simple possession but rather engaging in an activity related to commerce. *See, e.g.*, *Hallet v. Jenks*, 7 U.S. 210, 219 (1805) (Marshall, C.J.) (statutory prohibition on trafficking with the French implied intentional commerce); *Webster's Third New International Dictionary* 2422 (1986) (defining "traffic" as "commercial activity usu. involving import and export trade"); U.S.S.G. § 2L1.2, comment. (n.1(B)(iv) (similar definition for "drug trafficking offense")); *see also United States v. Ibarra-Galindo*, 206 F.3d 1337, 1341 (9th Cir. 2000) (Canby, J., dissenting) ("[C]ommon sense rebels at the thought of classifying bare possession of a tiny amount of narcotic as a drug trafficking crime . . . ."). Because the common world cannot be expected to perceive the government's

interpretation of "traffic," the rule of lenity properly requires the Court to avoid it.[14]

2. The Court should avoid relying on general policy statements to support an interpretation that is harsher than clearly required by the statute.

Except in rare cases, it is improper to construe a criminal statute against a defendant on the basis of general policy statements. *See Crandon v. United States*, 494 U.S. 152, 160 (1990); *Hughey v. United States*, 495 U.S. 411, 422 (1990). But courts have relied on such general policy statements when construing § 924(c)(2) against defendants like Petitioner Toledo-Flores. Two instances of such reliance bear comment.

First, courts have relied on a belief that the State Felony Approach comports with a "foundational premise" of the Sentencing Guidelines that, in the calculation of a defendant's criminal history category, "a defendant's history of criminal activity in violation of state law is to be treated on a par with his history of crimes committed in violation of federal law." *United States v. Restrepo-Aguilar*, 74 F.3d 361, 365 (1st Cir. 1996) (emphasis omitted); *see also Ibarra-Galindo*, 206 F.3d at 1340. But

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[14] Furthermore, as urged by in other briefs before the Court, the Court should interpret "trafficking" within the phrase "illicit trafficking in a controlled substance," 8 U.S.C. § 1101(a)(43)(B), to mean precisely what it commonly means.

neither the INA's definition of "aggravated felony" nor § 924(c)'s definition of "drug trafficking crime" were written with any relation to the general policy for calculating criminal history under Chapter Four of the Sentencing Guidelines. Indeed, the application of these definitions in Petitioner Toledo-Flores's case involved a Chapter Two enhancement. *See* U.S.S.G. § 2L1.2(b)(1)(C). Lenity prohibits reliance on that general policy to resolve this specific question of statutory construction.

Second, the Second Circuit has suggested that the relatively harsh State Felony Approach is appropriate because "[i]n recent years, Congress has substantially increased maximum sentences authorized for the offense of illegal reentry following felony convictions." *United States v. Pornes-Garcia*, 171 F.3d 142, 148 (2d Cir. 1999). But, as this Court stated in an analogous situation, it is not possible to "divine from the legislators' many 'get tough on drug offenders' statements any reliable guidance to particular provisions." *United States v. Granderson*, 511 U.S. 39, 49 (1994). Congress's pursuance of a "get tough on illegal reentry" policy from 1996 to 1999 cannot resolve the specific question of statutory interpretation presented by 18 U.S.C. § 924(c)(2). To the contrary, if the punitive purpose of a penal statute were grounds for a broad construction, then the rule of lenity would be turned on its head.

E. The rule of lenity should have restrained courts from adopting the State Felony Approach.

The rule of lenity is fundamentally a rule of judicial restraint. The purpose of any penal statute is to punish wrongdoers. And so judges aiming to advance that purpose will be tempted to stretch the letter of criminal statutes. *United States v. Wiltberger*, 18 U.S. 76, 96 (1820); *Bifulco v. United States*, 447 U.S. 381, 401-02 (1980) (Burger, C.J., concurring) (indicating that the rule of lenity responds to "[our] temptation to exceed our limited judicial role and do what we regard as the more sensible thing"); *Moskal v. United States*, 498 U.S. 103, 132 (1990) (Scalia, J., dissenting) ("The temptation to stretch the law to fit the evil is an ancient one, and it must be resisted."). But the rule of lenity counteracts that temptation by requiring courts to hew to the text, eschew arguments based on general policies, place a premium on commonsense, and, of course, resolve any ambiguity in the defendant's favor. *See id.*

In the history of § 924(c)(2)'s inconsistent interpretation, consideration of the rule of lenity and its underlying principles is largely absent. Six circuit court decisions between 1996 and 1999 established the State Felony Approach after the BIA had adopted the Federal Felony Approach. *See supra* at pages 8 to 9. None addressed the rule of lenity. *Cf. Bifulco*, 447 U.S. at 400 n.17 (noting that failure to address rule of lenity may render the lower courts' relatively harsh interpretation questionable). None fully addressed the BIA's textual

interpretation, and most did not even mention the BIA's holding or any textual argument contrary to the State Felony Approach. None noted that the Attorney General had acceded to the Federal Felony Approach. Even if the statute was ambiguous, the vexatious splits between circuits, within circuits, and between criminal and immigration courts could have been avoided by adherence to the rule of lenity.

CONCLUSION

If the statutory meaning is unclear, the rule of lenity mandates the adoption of the most lenient reasonable interpretation of the statute. At a minimum, it requires the Court to reject the State Felony Approach. It is respectfully requested that the Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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v.

ALBERTO R. GONZALES, Attorney General of the United States, *Respondent*.

REYMUNDO TOLEDO-FLORES, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH AND FIFTH CIRCUITS

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Webster's New International Dictionary (2d ed. 1959) 7, 12, 14
The American Heritage College Dictionary (3d ed. 2000) 7, 12
The Oxford English Dictionary (2d ed. 1989) 7

The question in this case is whether a state conviction for simple possession of a controlled substance qualifies as an "aggravated felony" within the meaning of the Immigration and Nationality Act. The courts of appeals have misconstrued and disregarded the critical statutory terms of 8 U.S.C. § 1101(a)(43)(B) and, as a result, have reached different conclusions on this question. Amici respectfully submit the instant brief to demonstrate that the statute, properly understood based on its plain language, does not encompass simple drug possession offenses. Accordingly, the judgments below in *Lopez* v. *Gonzales*, 417 F.3d 934 (8th Cir. 2005), and *United States* v. *Toledo-Flores*, 149 Fed. Appx. 241 (5th Cir. 2005), should be reversed.

INTEREST OF AMICI[1]

The NYSDA Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center dedicated to advancing the legal rights of immigrants. A national expert on the intersection of criminal and immigration law, IDP trains and advises both criminal justice and immigrant advocates on issues that involve the immigration consequences of criminal convictions. IDP seeks to improve the quality of justice for non-citizens accused of criminal conduct and therefore has a keen interest in the fair and just administration of the nation's immigration laws.

The American Civil Liberties Union ("ACLU") is a nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this Nation's civil rights laws. The Immigrants' Rights Project ("IRP") of the ACLU conducts a nationwide program of litigation and advocacy to

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[1] Pursuant to Rule 37.3(a), letters of consent to the filing of this brief are being lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

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enforce and protect the constitutional and civil rights of noncitizens.

Founded in 1946, the American Immigration Lawyers Association ("AILA") is a national nonprofit association of over 9,500 attorneys and law professors who practice and teach in the field of immigration and nationality law. AILA works to promote justice, advocate for fair and reasonable immigration law and policy, and advance the quality of immigration and nationality law and practice in the United States. AILA member attorneys represent tens of thousands of immigrant families and regularly appear before federal courts throughout the United States.

The Immigrant Legal Resource Center ("ILRC") is a national clearinghouse that provides technical assistance, training, and publications to low-income immigrants and their advocates to advance immigrant rights. Among its other areas of expertise, the ILRC is a leading authority on the intersection between immigration and criminal law. The ILRC provides daily assistance to criminal and immigration defense counsel on issues relating to citizenship, immigration status, and the immigration consequences of criminal convictions.

Founded in 1958, the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with more than 13,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. NACDL is dedicated to promoting criminal law research, encouraging integrity, independence, and expertise among criminal defense counsel, and advancing the proper and efficient administration of justice. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The National Legal Aid and Defender Association ("NLADA") is a nonprofit corporation dedicated to supporting indigent defender services and providing civil legal assistance. NLADA has approximately 680 program members, representing 12,000 lawyers, as well as approximately 1,000

individual members. NLADA is a leading voice in public policy debates on equal justice issues, and it is the oldest and largest national nonprofit membership association that devotes its resources exclusively to serving the equal justice community.

BACKGROUND

Statutory Framework

Title 8 U.S.C. § 1101(a)(43)(B) defines when a noncitizen may be deemed an aggravated felon. The provision provides in relevant part that the term "aggravated felony" means:

> illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18). . . . The term applies to an offense described in this paragraph whether in violation of Federal or State law . . . .

In other words, those who are convicted of "illicit trafficking" "including" a "drug trafficking crime" are subject to treatment as aggravated felons.

In properly interpreting this provision, three terms must be understood and given effect: "illicit trafficking," "including," and "drug trafficking crime." The first relevant term, "illicit trafficking," is not statutorily defined. The second relevant term, "including," is also not defined. The final relevant term, "drug trafficking crime," is defined by cross reference to 18 U.S.C. § 924(c)(2), which in turn provides: "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)."

Virtually all of the courts that have considered the statute's scope have focused on the last term of the statute, namely, whether a particular crime purportedly qualifies as "a drug trafficking crime (as defined in section 924(c) of Title

18)."[2] These courts have essentially disregarded the rest of the statutory terms and have instead "'navigate[d] a rather confusing maze of statutory cross-references,'" *United States* v. *Palacios-Suarez*, 418 F.3d 692, 695 (6th Cir. 2005) (quoting *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 903 (9th Cir. 2002)), tracing 8 U.S.C. § 1101(a)(43)(B) to 18 U.S.C. § 924(c)'s definition of "drug trafficking crime"; then to the Controlled Substances Act (21 U.S.C. § 801 et seq.); and often then to the "felony" definition of 21 U.S.C. § 802(13).

By following this path, the courts of appeals have encountered startling ambiguity, have adopted inconsistent interpretations of the same statutory language, and, in many circuits, have reached the somewhat jarring conclusion that a *state-law simple possession* offense can be a *"drug trafficking crime,"* and, therefore, an aggravated felony. *See, e.g., United States* v. *Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1142 (2006) (concluding that a state-law misdemeanor conviction for possession of codeine, which resulted in sentence of sixty days, was a "drug trafficking crime" and therefore an aggravated felony).

The Petitioners

Petitioners Lopez and Toledo-Flores were convicted of possessing controlled substances in violation of state law. Specifically, Petitioner Lopez was convicted under the law of South Dakota for aiding and abetting the possession of a

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[2] *See, e.g., Lopez*, 417 F.3d at 937; *Toledo-Flores*, 149 Fed. Appx. at 242; *see also United States* v. *Restrepo-Aguilar*, 74 F.3d 361, 364-366 (1st Cir. 1996); *United States* v. *Pornes-Garcia*, 171 F.3d 142, 145-146 (2d Cir. 1999); *United States* v. *Wilson*, 316 F.3d 506, 512-513 (4th Cir. 2003); *United States* v. *Hinojosa-Lopez*, 130 F.3d 691, 693-694 (5th Cir. 1997); *United States* v. *Palacios-Suarez*, 418 F.3d 692, 695-700 (6th Cir. 2005); *Gonzales-Gomez* v. *Achim*, 441 F.3d 532, 533-534 (7th Cir. 2006); *United States* v. *Briones-Mata*, 116 F.3d 308, 309 (8th Cir. 1997); *United States* v. *Ibarra-Galindo*, 206 F.3d 1337, 1339-1341 (9th Cir. 2000); *United States* v. *Cabrera-Sosa*, 81 F.3d 998, 1000 (10th Cir. 1996); *United States* v. *Simon*, 168 F.3d 1271, 1272 (11th Cir. 1999).

controlled substance (cocaine), and Petitioner Toledo-Flores was convicted under the law of Texas for simple possession of a mere 0.16 grams of cocaine. Although neither conviction included any element of trafficking or distribution, the courts below determined that each of these state-law possession offenses was a "drug trafficking crime" and, therefore, an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B).

The determination that a non-citizen is an aggravated felon has serious consequences in both the criminal and immigration contexts. In the criminal sentencing context, the determination that a non-citizen is an aggravated felon increases the statutory maximum sentence for illegal reentry from two years to twenty years. 8 U.S.C. § 1326(a) & (b)(2); USSG § 2L1.2(b)(1)(C); *see also Almendarez-Torres* v. *United States*, 523 U.S. 224, 226 (1998). And, in the immigration context, while non-citizens are rendered deportable for virtually all possession crimes involving controlled substances, 8 U.S.C. § 1227(a)(2)(B), serious additional consequences flow if a non-citizen is denominated an aggravated felon. *See, e.g.*, 8 U.S.C. § 1229b(a) (forbidding the Attorney General from granting cancellation of removal if the applicant has been convicted of an aggravated felony); 8 U.S.C. § 1158(b)(2)(B)(i) (barring asylum for aggravated felons, even with a well-founded fear of persecution in their countries of removal); 8 U.S.C. § 1182(a)(9)(A)(i) (barring an aggravated felon from reentering the United States); 8 U.S.C. §§ 1101(f)(8) & 1427(a)(3) (permanently barring aggravated felons from obtaining United States citizenship).

SUMMARY OF ARGUMENT

Title 8 U.S.C. § 1101(a)(43)(B)—which renders "illicit trafficking in a controlled substance . . . including a drug trafficking crime" an aggravated felony—does not encompass state-law simple possession offenses. In construing § 1101(a)(43)(B), three separate terms must be understood and given effect: "illicit trafficking," "including," and "drug trafficking crime."

The question in this case is whether a state conviction for simple possession of a controlled substance qualifies as an "aggravated felony" within the meaning of the Immigration and Nationality Act. The courts of appeals have misconstrued and disregarded the critical statutory terms of 8 U.S.C. § 1101(a)(43)(B) and, as a result, have reached different conclusions on this question. Amici respectfully submit the instant brief to demonstrate that the statute, properly understood based on its plain language, does not encompass simple drug possession offenses. Accordingly, the judgments below in *Lopez* v. *Gonzales*, 417 F.3d 934 (8th Cir. 2005), and *United States* v. *Toledo-Flores*, 149 Fed. Appx. 241 (5th Cir. 2005), should be reversed.

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First, Congress's use of the word "including" demonstrates that the initial term, "illicit trafficking," sets forth the *broader* category, and that the later term, "drug trafficking," is a *subset* of this broader term. Based on the text's plain meaning and the presumption against rendering statutory provisions superfluous, "illicit trafficking" defines the outer bounds of conduct that is swept within § 1101(a)(43)(B), and "drug trafficking" is a component of that larger preceding class. *See infra* Part I.

Second, the plain meaning of the broader term, "illicit trafficking," is clear: According to dictionary definitions, decades of consistent case law, and Congress's own use and definition of the term, "illicit trafficking" only covers actions connected to commercial activity (the trade, exchange, distribution for remuneration, or sale of drugs). Importantly, the plain meaning of "illicit trafficking" in a controlled substance does *not* include simple possession. *See infra* Part II.

Finally, the third term, "drug trafficking crime," is a component of the broader term "illicit trafficking." While the more expansive term, "illicit trafficking," explicitly covers both state and federal trafficking offenses, "a drug trafficking crime" only encompasses *federal* trafficking offenses. In other words, "illicit trafficking" describes the broader category of state and federal trafficking offenses; a "drug trafficking crime" (as defined in 18 U.S.C. § 924(c)(2)), describes the *federal subset* of trafficking offenses included in that broader category. *See infra* Part III.

ARGUMENT

I. "DRUG TRAFFICKING CRIME" IS A SUBSET OF "ILLICIT TRAFFICKING"

Title 8 U.S.C. § 1101(a)(43)(B) renders an immigrant an aggravated felon if he has been convicted of "illicit trafficking in a controlled substance . . . *including* a drug trafficking crime (as defined in section 924(c) of Title 18)" (emphasis added). Because the clause "drug trafficking crime" *follows* the word "including," "illicit trafficking" defines a general

class of offenses, and "drug trafficking crime" is a subset of that larger preceding group.

These two terms fit together in a natural way: The broader term "illicit trafficking" encompasses both *state and federal trafficking offenses*, and "drug trafficking crime," the narrower term in § 1101(a)(43)(B), only refers to the *federal* subset of this class. State-law possession offenses are therefore excluded from § 1101(a)(43)(B).

A. Enumerated Items Or Definitions That Follow The Word "Including" Are Part Of A Larger Preceding Group

The word "including" has a firmly established meaning. Black's Law Dictionary 777 (8th ed. 2004) defines the word "include" to mean: "To contain as a part of something." Webster's New International Dictionary 1258 (2d ed. 1959) defines "include" as: "To comprehend or comprise, as a genus the species, the whole a part . . . to contain; embrace." The American Heritage College Dictionary 687 (3d ed. 2000) defines "include" to mean: "(1) To take in as a part, an element, or a member. (2) To contain as a secondary or subordinate element. [or] (3) To consider with or place into a group, class, or total." Likewise, the Oxford English Dictionary 801 (2d ed. 1989) states that the word "including" "particulariz[es] a person or thing included in a group previously (or afterwards) mentioned; = Inclusive of."

This Court has frequently observed that the word "including" indicates that that which follows is a subset of the larger preceding class. *See S.D. Warren Co.* v. *Maine Bd. of Envt'l Protection*, 126 S. Ct. 1843, 1847 (2006) (observing that the term "discharge," which preceded the word "including," must be "broader" than the terms following the word "including"); *Federal Land Bank of St. Paul* v. *Bismark Lumber Co.*, 314 U.S. 95, 100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"); *Helvering* v. *Morgan's Inc.*, 293 U.S. 121, 125 n.1 (1934) ("[T]he verb 'includes' imports a general class, some of whose particular instances are those specified in the definition."); *see also*

Chickasaw Nation v. *United States*, 534 U.S. 84, 85 (2001) ("To 'include' is to 'contain' or 'comprise as part of a whole.' ") (quotation omitted).

Young v. *United States*, 315 U.S. 257 (1942), illustrates this principle. In *Young*, the Harrison Anti-Narcotic Act required "any manufacturer, producer, compounder, or vendor (including dispensing physicians)" who administered narcotics to keep adequate records. *Id.* at 258. Petitioner, a practicing physician, kept no records and was therefore convicted of dispensing narcotics in violation of the statute. This Court reversed petitioner's conviction. The Court stated that, in order to come within the Act's ambit, "the physician must be one who manufacturers, produces, compounds, or vends, or possibly only one who vends." *Id.* at 259. Even though the clause "dispensing physicians," if read in isolation, might cover petitioner, the word "including" demonstrated that "dispensing physicians" was a subset of the preceding terms; and because petitioner did not fall within any of the preceding categories (*i.e.*, he was not a manufacturer, vendor, or the like), he could not be "a 'dispensing physician' within the meaning" of the Act. *See id.* at 261.

In sum, under the plain meaning of the term "including," as well as under this Court's precedent, the term "illicit trafficking" defines a general class of offenses. A "drug trafficking crime" describes a particular and more narrow class of offenses contained within the broader "illicit trafficking" category.

B. The Government's Interpretation Fails To Give Meaning To Either The Term "Illicit Trafficking" Or "Including"

In its effort to interpret 8 U.S.C. § 1101(a)(43)(B) to encompass simple possession offenses, the Government ignores the word "including" and, in effect, renders the term "illicit trafficking" a nullity.

Under the Government's reading, a "drug trafficking crime" not only encompasses state and federal crimes that

have a trafficking component—it also covers a broad range of state-law simple possession offenses. The Government's sweeping definition essentially deprives the term "illicit trafficking" of any meaning and, therefore, is inconsistent with an "elementary canon of construction," the rule against superfluities. *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004); *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001); *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979); *see, e.g.*, *S.D. Warren Co.*, 126 S. Ct. at 1847; *see also infra* Section III.B.2 (detailing Congress's addition of the term "illicit trafficking").[3]

The Government may contend that "illicit trafficking" and a "drug trafficking crime" should be understood to be synonymous. As an initial matter, such a reading would again render the term "illicit trafficking" a nullity. *See Colautti*, 439 U.S. at 392. In addition, such a reading would violate the plain language of the statute. Title 8 U.S.C. § 1101 uses both the words "means" and "includes" or "including";[4]

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[3] In addition, the Government's expansive definition of the term "drug trafficking crime" makes the "controlled substance" category for deportability of aliens virtually meaningless. Title 8 U.S.C. § 1227(a)(2)(A)(iii) renders non-citizens denominated aggravated felons deportable, while § 1227(a)(2)(B) renders a non-citizen "convicted of a violation of (or a conspiracy or attempt to violate) any law . . . relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana" deportable. Under the Government's reading of § 1101(a)(43)(B), virtually *every* controlled substance offense constitutes an aggravated felony. As such, virtually all controlled substances offenders are rendered deportable pursuant to § 1227(a)(2)(A)(iii) rather than the more natural § 1227(a)(2)(B), with the result that § 1227(a)(2)(B) is largely divested of independent effect. Likewise, the Government's interpretation leads to the nonsensical result that a person convicted under state law of possessing 30 grams or less of marijuana could be considered an aggravated felon pursuant to § 1101(a)(43)(B) if state law deems the offense a felony but not a controlled substances offender pursuant to § 1227(a)(2)(B), although the former denomination entails far harsher consequences than the latter.

[4] Section 1101 uses the word "mean" or "means" at least 46 times. *See, e.g.*, § 1101(a)(1), (a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9), (a)(10), (a)(11), (a)(13)(A), (a)(15), (a)(16), (a)(18), (a)(19), (a)(20), (a)(21), (a)(22), (a)(23), (a)(26), (a)(27), (a)(29), (a)(30), (a)(31), (a)(33), (a)(34), (a)(37), (a)(38), (a)(39), (a)(40), (a)(41), (a)(42), (a)(43), (a)(44)(A), (a)(44)(B), (a)(45), (a)(46),

the specific subpart at issue, § 1101(a)(43)(B), however, employs only the word "including." Because Congress used both the words "means" and "including" throughout the statute, it is clear that these verbs are used intentionally and purposefully. *See Bates* v. *United States*, 522 U.S. 23, 29-30 (1997). Congress therefore foreclosed any reading of "illicit trafficking" and "drug trafficking crime" that equates the two terms. *See S.D. Warren Co.*, 126 S. Ct. at 1849; *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 189 (1941); *see also United States* v. *New York Tel. Co.*, 434 U.S. 159, 169 n.15 (1977); *Helvering*, 293 U.S. at 126 n.1.

Alternatively, the Government may attempt to defend the Board of Immigration Appeals' established interpretation of § 1101(a)(43)(B), which essentially substitutes the word "or" for the word "including." The Board of Immigration Appeals ("BIA") has properly held that, in order to constitute "illicit trafficking," an immigrant's controlled substance offense must contain a commonsense trafficking element and that a simple possession offense is not within this definition. *See, e.g., Matter of Davis*, 20 I. & N. Dec. 536, 540-541 (BIA 1992). In so holding, however, the BIA has erroneously severed § 1101(a)(43)(B) in two, holding that a person can be rendered an aggravated felon if he has been convicted of *either* "illicit trafficking" (which requires a nexus to trafficking) *or* a "drug trafficking crime" (as defined in § 924(c)). *Id.* at 543-544. The BIA has therefore effectively (and improperly) substituted the word "or" for the word "including."

In short, Congress did not use the word "means," "or," or any other connecting word or phrase; it instead chose the word "including." As a result, based on the plain language of

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(a)(47)(A), (a)(48)(A), (a)(49), (a)(50), (b)(1), (b)(2), (b)(3), (b)(4), (c)(1), (h). The word "including" or "includes" is used at least 17 times. *See, e.g.*, § 1101(a)(13)(C)(iv), (a)(14), (a)(15)(E) & (H) & (O)(ii)(III) & (U)(i)(IV) & (U)(ii)(V), (a)(17), (a)(28), (a)(36), (a)(43)(B) & (G), (b)(4), (b)(5), (c)(1), (c)(2), (f)(8). (This tally does not include the several times that the statute refers to that which is included "but is not limited to.")

the statute, "illicit trafficking" is the broader term and defines the outer bound of the statutory definition, and "drug trafficking crime" is a narrower subset of this broader category.

II. "ILLICIT TRAFFICKING" MEANS COMMERCIAL ACTIVITY INVOLVING THE TRADE, EXCHANGE, DISTRIBUTION FOR REMUNERATION, OR SALE OF GOODS, AND DOES NOT INCLUDE SIMPLE POSSESSION OFFENSES

"Illicit trafficking" is the broader term, fully encompassing the subset of "drug trafficking crime[s]." Because "illicit trafficking" is not defined, the term must be afforded its "ordinary or natural meaning." *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994); *see Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 187 (1995); *Smith* v. *United States*, 508 U.S. 223, 228 (1993); *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993); *Perrin* v. *United States*, 444 U.S. 37, 42 (1979).[5]

In this case, the plain meaning of the term "illicit trafficking" is clear. As evidenced by: (1) dictionary definitions; (2) over a century of consistent case law; (3) interpretations of "illicit trafficking" in the related aggravated felony *firearms* context; (4) Congress's use and definition of the term

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[5] The fact that the undefined term, "illicit trafficking," is coupled with a defined term, "drug trafficking crime," in no way relaxes the requirement that "illicit trafficking" be construed pursuant to its plain meaning. Indeed, if anything, Congress's decision to define "drug trafficking crime" but not "illicit trafficking" heightens the command that "illicit trafficking" be construed in its ordinary and natural sense. The recent case of *S.D. Warren Co.* is illustrative. That case also involved a statutory provision containing an undefined term, the word "includ[ing]," and statutorily defined terms. 126 S. Ct. at 1847. And, as in this case, the undefined term and the defined terms contained the same word (there, the word "discharge"). The Court observed that "[t]he dispute turn[ed] on the meaning" of the undefined term, and in ascertaining the meaning of that term, the Court looked to the word's plain meaning: "since it is neither defined in the statute nor a term of art, we are left to construe it 'in accordance with its ordinary or natural meaning.'" *Id.* (quoting *Meyer*, 510 U.S. at 476).

"traffic" or "trafficking" in other statutes; and (5) the BIA's long-held interpretation of the clause "illicit traffic" to exclude those who merely possess illegal drugs—it is clear that "illicit trafficking" for purposes of § 1101(a)(43)(B) must involve commercial activity involving the trade, exchange, distribution for remuneration, or sale of a controlled substance. Quite simply, the plain meaning of "illicit trafficking" does not include possession offenses, such as those at issue here.[6]

A. Dictionary Definitions And Consistent Case Law Demonstrate That "Trafficking" Requires Commercial Activity

As commonly defined, "trafficking" necessarily involves commercial activity: the trade, exchange, distribution for remuneration, or sale of goods. Black's Law Dictionary 1534, for instance, defines "traffic" as "[c]ommerce; trade; the sale or exchange of such things as merchandise, bills, and money" or "[t]he passing or exchange of goods or commodities from one person to another for an equivalent in goods or money." Webster's New International Dictionary 2685 defines "traffic" as "to engage in commerce; to barter, buy or sell goods" or alternatively, "[t]o engage in illicit sale or purchase; to trade in something not properly for sale." Likewise, the American Heritage College Dictionary 1434 defines "traffic" as "[t]he commercial exchange of goods; trade." Mere possession does not and cannot constitute "trafficking" as the term is commonly defined and understood.

In keeping with these dictionary definitions, courts have, not surprisingly, long interpreted "trafficking" to require commercial activity. *See Urena-Ramirez* v. *Ashcroft*, 341 F.3d 51, 57 (1st Cir. 2003) ("Courts define 'illicit trafficking' as illegally 'trading, selling or dealing' in specified goods.") (citation omitted); *State* v. *Ezell*, 468 S.E.2d 679, 681

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[6] Indeed, no court of appeals has held, and the Government has not specifically argued, that simple possession offenses fall within the plain and ordinary meaning of "illicit trafficking."

(S.C. Ct. App. 1996) ("Trafficking imputes the carrying on or the engaging in a business. The word 'traffic' has a popular meaning of an exchange or passing of goods or commodities for other goods or money."); *People* v. *Horan*, 127 N.E. 673, 674-675 (Ill. 1920) ("The meaning of traffic in property . . . relates to commercial exchange of goods, wares, or any kind of merchandise, whether by barter or the use of money, bills of exchange, or other like means."); *People* v. *Dunford*, 100 N.E. 433, 434 (N.Y. 1912) ("The word 'traffic' has the popular meaning of an exchange, or a passing, of goods, or commodities, for an equivalent in goods, or money."); *Senior* v. *Ratterman*, 11 N.E. 321, 324 (Ohio 1887) ("The word 'traffic' has always had a well-understood meaning in the popular sense. It is the passing of goods or commodities from one person to another for an equivalent in goods or money, and a trafficker is one who traffics—a trader; a merchant."); *see also Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739 (1989) (where an undefined term has "accumulated [a] settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms") (quotation omitted); *Standard Oil Co. of N.J.* v. *United States*, 221 U.S. 1, 59 (1911). Mere possession does not constitute "illicit trafficking."

Indeed, when the BIA construed the term "illicit trafficking" in *Matter of Davis*, the BIA held that "illicit trafficking" requires commercial activity. Relying on Black's Law Dictionary, the BIA explained that, "[e]ssential to the term . . . is its business or merchant nature, the trading or dealing of goods." 20 I. & N. Dec. at 541. Consequently, the BIA held, "[t]he offense of simple possession would appear to be one example of a drug-related offense not amounting to the common definition of 'illicit trafficking.'" *Id.*

B. "Illicit Trafficking In Firearms" For Purposes Of § 1101(a)(43)(C) Requires A Trafficking Element

Another subpart of 8 U.S.C. § 1101 further establishes that the phrase "illicit trafficking" for purposes of § 1101(a)(43)(B) requires commonsense trafficking. The

term "illicit trafficking" appears not only in § 1101(a)(43)(B), but also in the very next provision, § 1101(a)(43)(C). Subsection (C) renders anyone who has engaged in "*illicit trafficking* in firearms or destructive devices . . . or in explosive materials" an aggravated felon (emphasis added). Because "[a] term appearing in several places in a statutory text is generally read the same way each time it appears," *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994), the clause "illicit trafficking" should be interpreted in the same way in the neighboring controlled substance and firearm contexts.

Not surprisingly, both the BIA and the courts of appeals have routinely demanded a showing of trafficking in the firearms context of subpart (a)(43)(C). In *Kuhali* v. *Reno*, 266 F.3d 93, 98 (2d Cir. 2001), for instance, the petitioner pled guilty to conspiracy to export firearms and ammunition without a license. Before the BIA, the petitioner argued that his export offense did not involve "trafficking." The BIA rejected the argument stating that the "essential sense of the term [trafficking] was its business or merchant nature, *i.e.*, trading, selling or dealing in goods" and that exporting firearms without a license satisfied this standard. *Id.* at 107.

The Second Circuit affirmed, observing that the "Board's specific reading of the term trafficking comports well with the legal and everyday usages of that term" and that the unlicensed export of firearms exhibits a business or merchant nature such that it constitutes commercial "dealing" in firearms. 266 F.3d at 108-109 (citing Webster's New Collegiate Dictionary 1229 (1981)); *see also United States* v. *Lindquist*, 421 F.3d 752, 755 (8th Cir. 2005) (concluding that, for purposes of USSG § 2K2.1, "an offense falls within the ambit of 'firearms trafficking' when it involves illegal commercial activity involving firearms").

Under the Government's reading of § 1101(a)(43)(B), the term "trafficking" necessarily encompasses simple "possession." Yet, the same reading of the term in § 1101(a)(43)(C) would transform simple firearm possession into "trafficking" in firearms, a position that the Government itself has not

embraced. *See* United States Br., *Kuhali* v. *Reno*, No. 00-2531, *available at* 2001 WL 34120929, at *23 ("It is the movement of the firearms in international commerce that makes the offense a trafficking offense within the meaning of Section 101(a)(43)(C) of the INA."); *see also Hoong* v. *INS*, No. 95-70197, 1996 WL 297621, at *1 n.1 (9th Cir. June 3, 1996) (observing that, for purposes of 8 U.S.C. § 1101(a)(43)(C), "the mere possession of a weapon does not amount to 'illicit trafficking in firearms'").

C. Other Statutes Confirm That The Term "Illicit Trafficking" Requires A Commercial Element

Other provisions of the U.S. Code confirm that the term "trafficking" requires a commercial element. The terms "traffic" and "trafficking" appear frequently in the U.S. Code. When they appear, as one would expect, Congress consistently defines the terms to refer to commonsense trafficking rather than mere possession.[7]

1. Title 21 U.S.C. § 862—Enacted When The Term "Aggravated Felony" Was Coined And When § 924(c)(2) Was Amended—Distinguishes Between "Trafficking" And "Possession"

When Congress defined the term "aggravated felony," it clearly understood the difference between simple possession and trafficking offenses. Title 21 U.S.C. § 862, which denies federal benefits to controlled substance offenders, is particularly instructive, as Congress enacted it contempora-

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[7] *See* 2B N. Singer, *Sutherland on Statutory Construction* § 53.03, at 329 (6th ed. 2000) (recognizing that "by transposing the clear intent expressed in one or several statutes to a statute of doubtful meaning, the court . . . is able to give effect to the probable intent of the legislature"); *see also, e.g., Reno* v. *Koray*, 515 U.S. 50, 58 (1995) (using other statutes' construction of the clause "official detention" to aid interpretation of the clause in 18 U.S.C. § 3585(b) and noting that the same term "should bear the same meaning" in "related" statutes); *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 131-132 (1943) (using the Federal Employers' Liability Act to aid the interpretation of Fair Labor Standards Act of 1938).

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neously with the definition of "aggravated felony." Section 862 expressly distinguishes between those convicted of *possessing* controlled substances and those convicted of *trafficking*. Section 862(a)(1), under the heading "Drug traffickers," states that "[a]ny individual who is convicted of any Federal or State offense consisting of the distribution of controlled substances shall" be ineligible for federal benefits for up to five years after conviction.[8] Subpart (a)(1) therefore equates "traffickers" with those guilty of "distribution." Meanwhile, subpart (b)(1), under the heading "Drug possessors," states that "[a]ny individual who is convicted of any Federal or State offense involving the possession of a controlled substance" shall be ineligible for federal benefits for up to one year following conviction.

Importantly, Congress enacted 21 U.S.C. § 862 as part of the Anti-Drug Abuse Act ("ADAA") of 1988, Pub. L. No. 100-690, § 5301, 102 Stat. 4181, 4310.[9] This is *the very same Act* that introduced the term "aggravated felony" into the immigration law lexicon, made drug "traffick[ers]" aggravated felons, and amended 18 U.S.C. § 924(c)(2)'s definition of a "drug trafficking crime." *See Leocal* v. *Ashcroft*, 543 U.S. 1, 4 n.1 (2004) (discussing the ADAA).

In summary, at the very same time and via the very same Act by which Congress made those who engaged in "drug trafficking" aggravated felons, Congress also: (1) expressly distinguished between possessors and traffickers, subjecting the latter to far harsher penalties; and (2) defined "traffick[ing]" by reference to "distribution." Thus—in light of the "basic canon of statutory construction that identical terms within an Act bear the same meaning," *Estate of*

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[8] *See Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) (while not controlling, a statute's title and heading are often informative); *see also, e.g., Porter* v. *Nussle*, 543 U.S. 516, 527-528 (2002) (relying on a provision's caption to determine its meaning).

[9] Title 21 U.S.C. § 862 was later amended in 1990, although it was not materially changed. *See* Pub. L. No. 101-647, § 1002(d), 104 Stat. 4827 (1990).

Cowart v. *Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992)—just as Congress excluded possession from the meaning of trafficking in § 862, Congress similarly excluded possession offenses from the definition of trafficking in the aggravated felony definition. *See Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932); *see also, e.g.*, *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990); *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986).

2. Congress Repeatedly Uses "Trafficking" In Its Commonsense Way

In other portions of the U.S. Code as well, Congress repeatedly uses "trafficking" consistent with its plain meaning, *i.e.*, as requiring a connection to commercial activity, and Congress consistently distinguishes "trafficking" from "possession."

Title 18 U.S.C. § 1028(a)(8), for instance, makes it a crime to "knowingly traffic[] in false or actual authentication features for use in false identification documents, document-making implements, or means of identification." Subsection (d)(12) defines "traffic," for purposes of the statute, as "(A) to transport, transfer, or otherwise dispose of, to another, as consideration for anything of value; or (B) to make or obtain control of with intent to so transport, transfer, or otherwise dispose of." It is a separate crime to "possess" a fraudulent identification card with a nefarious intent.

Similarly, 18 U.S.C. § 2320(a), which outlaws trafficking in counterfeit goods or services, provides: "Whoever intentionally traffics or attempts to traffic in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services . . . shall . . . be fined . . . or imprisoned[.]" Subsection (e)(2) states: "the term 'traffic' means to transport, transfer, or otherwise dispose of, to another, for purposes of commercial advantage or private financial gain, or to make, import, export, obtain control of, or possess, with intent to so transport, transfer, or otherwise dispose of." And 17 U.S.C. § 1101, which outlaws the unauthorized fixation and trafficking in sound recordings and mu-

sic videos, borrows this same definition of "traffic" from § 2320(e)(2). *See* 17 U.S.C. § 1101(b).

Indeed, when Congress defines the word "commerce" throughout the U.S. Code, it does so by reference to a few synonyms such as "trade" and "traffic." *See, e.g.*, 29 U.S.C. § 152(6); 29 U.S.C. § 652(3); 29 U.S.C. § 1002(11); 30 U.S.C. § 802(b).

In short, when the term "trafficking" appears in the U.S. Code, Congress defines the term in a manner consistent with its plain meaning and distinguishes the term from mere possession.

D. By The Time Congress Amended 8 U.S.C. § 1101 To Include The Term "Illicit Trafficking," The BIA Had Long Held That Possession Does Not Constitute "Illicit Trafficking"

Finally, in enacting legislation, Congress is presumed to be aware of longstanding administrative interpretations of particular statutory language. *See Commissioner of Internal Revenue* v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). By the time Congress deemed those who engage in "illicit trafficking" aggravated felons, the term "illicit trafficking" had a settled administrative meaning, dating back half a century. As a result, when Congress amended the aggravated felony provision in 1990 to include the term "illicit trafficking," Congress incorporated the phrase's well-established interpretation. *Keystone Consol. Indus.*, 508 U.S. at 159 (concluding that because "[t]he phrase 'sale or exchange' had acquired a settled judicial and administrative interpretation," when Congress used the phrase, Congress incorporated the phrase's already settled meaning).

The Immigration and Nationality Act of 1952 made a non-citizen inadmissible to the United States if he or she, *inter alia*, had "been convicted of a violation of any law or regulation relating to the *illicit traffic* in narcotic drugs." 8 U.S.C. § 1182(a)(23) (1952) (emphasis added). The very year after this provision was enacted, the meaning of the clause

"illicit traffic" was challenged. The Government urged the BIA to conclude that a non-citizen who had been convicted of possession of narcotics under California law had engaged in "illicit trafficking" for purposes of the 1952 Act. *In the Matter of L----*, 5 I. & N. Dec. 169, 171 (BIA 1953). The BIA summarily rejected the Government's interpretation, concluding:

> The alien in the instant case was convicted merely of possession. . . . Traffic has been defined as commerce; trade; sale or exchange of merchandise, bills, money, and the like; the passing of goods or commodities from one person to another or an equivalent in goods or money; and a trafficker is one who trafficks or a trader, a merchant. . . . [A] conviction solely for possession, without more, . . . does not constitute a conviction of illicit traffic in narcotic drugs[.]

Id. at 171-172;[10] *see also In the Matter of B----*, 5 I. & N. Dec. 479, 480-481 (BIA 1953).

This definition of "illicit trafficking" was long-settled by the time Congress again enacted immigration legislation at 8 U.S.C. § 1101(a)(43)(B), using the precise term "illicit trafficking." In so doing, Congress could not have intended to reach those who merely possess illicit drugs.[11]

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[10] In 1956, Congress added language to § 241(a)(11) of the Immigration and Nationality Act to make a conviction for "illicit possession" of narcotics a ground for deportation. *See* Narcotic Control Act of 1956, Pub. L. No. 84-728, § 301(a), 70 Stat. 567, 575. The amended language required the deportation of an alien convicted of a law "relating to the illicit possession of or traffic in narcotic drugs or marihuana." 8 U.S.C. § 1182(a)(23) (1956). Thus, Congress clearly understood "possession of" and "traffic in" drugs to be two distinct acts.

[11] Of course, if there is proof that a person possesses controlled substances *with an intent to sell them*, his or her conduct falls within the plain meaning of "trafficking." *See, e.g., Gonzales-Gomes* v. *Achim*, 441 F.3d 532, 534 (7th Cir. 2006); *see also Virginia* v. *Black*, 538 U.S. 343, 398 (2003) (Thomas, J., dissenting) (equating "possession with intent to distribute" with "trafficking"). Notwithstanding this caveat, there can be little doubt

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In short, under its plain meaning—as reflected by dictionary definitions, decades of consistent case law, a companion firearm provision, other statutes, and the legislative backdrop dating back half a century—"trafficking" requires commercial activity and does not include simple possession. *See Matter of Davis*, 20 I. & N. Dec. at 541 ("The offense of simple possession would appear to be one example of a drug-related offense not amounting to the common definition of 'illicit trafficking.'"); *see also Steele* v. *Blackman*, 236 F.3d 130, 136 n.5 (3d Cir. 2001) (equating "illicit trafficking" with "the marketing of drugs"); *Gonzales-Gomez* v. *Achim*, 372 F. Supp. 2d 1062, 1065 (N.D. Ill. 2005), *aff'd*, 441 F.3d 532 (7th Cir. 2006) ("It is undisputed that a simple drug possession does not constitute 'illicit trafficking in a controlled substance'[.]"). Petitioners' drug possession offenses do not constitute "illicit trafficking" within the meaning of § 1101(a)(43)(B).

III. A "DRUG TRAFFICKING CRIME" AS DEFINED BY 18 U.S.C. § 924(c)(2) REFERS TO ONLY *FEDERAL* TRAFFICKING OFFENSES

The final relevant term in the aggravated felony definition—"drug trafficking crime"—is a subset of the broader term "illicit trafficking." The broader term, "illicit trafficking," applies to all *federal and state* trafficking offenses. *See* 8 U.S.C. § 1101(a)(43) ("The term applies to an offense described in this paragraph whether in violation of Federal or State law[.]"); *Matter of Davis*, 20 I. & N. Dec. at 541 (concluding that "illicit trafficking" constitutes any state or federal felony conviction "involving the unlawful trading or dealing of any controlled substance"). The narrower term "drug trafficking crime" (as defined by 18 U.S.C. § 924(c)(2)) refers only to *federal* trafficking crimes. In other words, the

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that "possession" and "trafficking" are distinct categories—as demonstrated by the plain meaning of these words, as well as Congress's and the BIA's consistent use of these terms.

term "drug trafficking crime" defines the *subset of federal trafficking crimes* within the broader "illicit trafficking" category.

A. Section 924(c)(2)'s Plain Language And Broader Statutory Context Make Clear That The Term "Drug Trafficking Crime" Refers To Only Federal Offenses

Section 924(c)(2) defines "drug trafficking crime" for purposes of § 1101(a)(43)(B). It provides:

> For purposes of this subsection, the term "drug trafficking crime" means any *felony punishable under* the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

18 U.S.C. § 924(c)(2) (emphasis added).

By its plain terms, § 924(c)(2) reaches only federal felonies "punishable under," *inter alia*, the Controlled Substances Act. The federal Controlled Substances Act, by its terms, does not "punish" state-law-defined felonies, and, therefore, the plain language indicates that state-law crimes are not included. *See, e.g., Gonzales-Gomes*, 441 F.3d at 534. Indeed, other provisions of the statute—specifically, 18 U.S.C. § 924(g) and (k)—make it crystal clear that Congress did not intend to reach state-law violations. *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."); *see Reno* v. *Koray*, 515 U.S. 50, 56 (1995); *United States* v. *Morton*, 467 U.S. 822, 828 (1984).

Both § 924(g) and § 924(k) use the *identical key language* of § 924(c)(2), referring to conduct "punishable under the Controlled Substances Act . . . the Controlled Substances Import and Export Act . . . or the Maritime Drug Law Enforcement Act[.]" In addition, in both sections, Congress

separately refers to *state* controlled substance offenses, *i.e.*, violations of "any State law relating to any controlled substance."

Section 924(g) provides:

> Whoever, with the intent to engage in conduct which—
>
> (1) constitutes an offense listed in section 1961(1),
>
> (2) is *punishable under the Controlled Substances Act* (21 U.S.C. 802 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.),
>
> (3) *violates any State law* relating to *any controlled substance* (as defined in section 102(6) of the Controlled Substances Act, 21 U.S.C. 802(6)), or
>
> (4) constitutes a crime of violence (as defined in subsection (c)(3)),
>
> travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

18 U.S.C. § 924(g) (emphasis added).

Likewise, 18 U.S.C. § 924(k) provides:

> A person who, with intent to engage in or to promote conduct that—
>
> (1) is *punishable under the Controlled Substances Act* (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.);
>
> (2) *violates any law of a State* relating to *any controlled substance* (as defined in section 102

> of the Controlled Substances Act, 21 U.S.C. 802); or
>
> (3) constitutes a crime of violence (as defined in subsection (c)(3)),
>
> smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

18 U.S.C. § 924(k) (emphasis added).

Subsections 924(g) and (k) demonstrate two key points. First, Congress's separate enumeration of state-law offenses in subsections (g)(3) and (k)(2), alongside the concurrent use of the phrase "punishable under the Controlled Substances Act" in subsections (g)(2) and (k)(1), show that Congress understood drug offenses "punishable under the Controlled Substances Act" *not* to include state offenses. Thus, the phrase "punishable under the Controlled Substances Act"—whether appearing in § 924(c), (g), or (k)—refers to a crime that is or has been punished under that Act, as the plain language indicates. If it were otherwise, subsections (g)(3) and (k)(2), which refer to state-law controlled substances offenses, would be superfluous and "practically devoid of significance," *Leocal*, 543 U.S. at 12.

Second, subsections (g)(3) and (k)(2) show that, in the CSA, when Congress intended to reach a defendant who had violated a state-law drug crime, Congress made its intent explicit. *See Central Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164, 176-177 (1994). Congress *intentionally* referred to state-law offenses in subsections (g) and (k) but not in (c)(2). Under a bedrock canon of statutory construction, § 924(c)(2), which speaks only of federal offenses, located in the same statute as subsections which speak of state offenses, cannot be construed to reach those who have violated only state law. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the dispa-

rate inclusion or exclusion.") (quotation omitted); *see also Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452-454 (2002); *Duncan* v. *Walker*, 533 U.S. 167, 173-174 (2001). The "distinct provision" for state-law controlled substances offenses under subsections (g)(3) and (k)(2)—coupled with its noteworthy absence in (c)(2)—compels the conclusion that neither subsection (c)(2) itself, nor its substantive language, "encompass[es]" controlled substance offenses where the conviction is obtained pursuant to state law. *See Leocal*, 543 U.S. at 12.

Significantly, these comparable provisions were not only enacted by the same Congress and not only appear in the same statute—but *one is an immediately adjacent section of the very same Act.* In 1988, in § 6212 of the ADAA, Congress amended the definition of "drug trafficking crime" to its current form in 18 U.S.C. § 924(c)(2). *See* Pub. L. No. 100-690, § 6212, 102 Stat. 4181 (1988). Meanwhile, § 6211 of the ADAA—the preceding section of the very same Act—also enacted what is now 18 U.S.C. § 924(g) (set forth above). Hence, at the very moment Congress first defined a "drug trafficking crime" to refer to crimes "punishable under the Controlled Substances Act" (and two other specific statutes), Congress enacted the neighboring provision that makes clear that such language does *not* reach state-law crimes.

B. The Statutory Evolution Of § 924(c) And The Aggravated Felony Definition Confirm That § 924(c) Refers To Only Federal Offenses

The statutory evolution of § 924(c) and the aggravated felony definition underscore what the language of 18 U.S.C. § 924 makes plain: a "drug trafficking crime" refers only to crimes prosecutable under federal law.

1. The 1988 "Clarification" To The Definition Of "Drug Trafficking Crime"

The fact that § 924(c) only applies to federal offenses is further supported by its predecessor provision. That section provided an enhancement for "any felony violation of *Fed-*

eral law involving distribution, manufacture, or importation of any controlled substance" (emphasis added). In 1988, Congress made a "clarification" to the definition of "drug trafficking crime," substituting in "any felony punishable under," *inter alia*, "the Controlled Substances Act." *See* ADAA, Pub. L. No. 100-690, § 6212, 102 Stat. 4181 (1988). In so doing, Congress did not alter the statute's scope. Congress labeled its amendment a "*clarification* of definition of drug trafficking crimes" and was delineating the types of *federal* trafficking crimes within the definition's grasp; nowhere in the statute or legislative history did Congress refer to state crimes or indicate that this "clarification" was intended to greatly expand the provision's reach. 134 Cong. Rec. S17301, at S17363 (1988) (Section Analysis of Judiciary Comm. Issues in H.R. 5210 by Sen. Biden); *see also Gonzales-Gomez*, 441 F.3d at 534; *Cazarez-Gutierrez* v. *Ashcroft*, 382 F.3d 905, 914-916 (9th Cir. 2004); *Gerbier* v. *Holmes*, 280 F.3d 297, 308-309 (3d Cir. 2002).

Indeed, as noted above, in a neighboring provision of the very same Act, Congress added what is now § 924(g), making clear that Congress intended the phrase "any felony punishable under the Controlled Substances Act" (and two other federal drug statues) to refer only to federal crimes. *See* ADAA, Pub. L. No. 100-690, § 6211, 102 Stat. 4181 (1988); *see also supra* Section III.A.[12]

2. The 1990 Expansion To The Definition Of "Aggravated Felony"

The fact that § 924(c)—pre- and post-1988—is limited to federal crimes is further demonstrated by the 1990 amendments to the definition of "aggravated felony."

In amending 8 U.S.C. § 1101(a)(43)(B) in 1990, Congress's avowed purpose was to reach those convicted of *state*

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[12] Congress also enacted 21 U.S.C. § 862 at the same time. As noted *supra* in Section II.C.1, 21 U.S.C. § 862 distinguishes between possessors and traffickers and also, unlike the amended 18 U.S.C. § 924(c)(2), explicitly reaches those convicted of state, as well as federal, offenses.

drug trafficking offenses. *See, e.g.*, H.R. Rep. No. 101-681, at 147 (1990) (noting that the amendment's purpose was to specify that a state drug trafficking conviction renders a non-citizen an aggravated felon).

The fact that Congress amended § 1101(a)(43)(B) in order to reach state trafficking crimes is revealing: If "drug trafficking crime" under § 924(c) already encompassed state-law trafficking crimes, no amendment would have been necessary. But that was not the case. Prior to 1990, an aggravated felony only included "any drug trafficking crime as defined in section 924(c)(2) of Title 18, United States Code," *i.e.*, a federal drug offense. Congress's 1990 amendment thus demonstrates that that language does not extend to state-law crimes.

The manner in which Congress amended § 1101(a)(43)(B) is likewise revealing. In seeking to reach state offenses, Congress did not amend the underlying "drug trafficking crime" definition of 18 U.S.C. § 924(c)(2). The "drug trafficking crime" definition—and the reference to it in the aggravated felony definition—remained unchanged.

Rather, mindful of § 924(c)(2)'s limitations, Congress reached state trafficking crimes in a different way. First, it added the more general and encompassing term, "illicit trafficking in a controlled substance," which is now the first (and broader) clause of § 1101(a)(43)(B).[13] Second, it added a new provision at the end of subsection (a)(43), stating: "The term [aggravated felony] applies to an offense described in this paragraph whether in violation of Federal or State law[.]" 8 U.S.C. § 1101(a)(43).[14]

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[13] As noted above, the Government's sweeping interpretation of "drug trafficking" crime essentially swallows the term "illicit trafficking." Thus, the Government's interpretation would require the Court to accept that Congress specifically amended the statute in 1990 by adding words ("illicit trafficking in a controlled substance") that have little or no meaning.

[14] *See* Immigration Act of 1990, Pub. L. No. 101-649, § 501(a), 104 Stat. 4978, 5048, as corrected by Miscellaneous and Technical Immigration

Hence, in seeking to expand the "aggravated felony" category to encompass state-law trafficking crimes, Congress added the broad term "illicit trafficking" and made clear that it applies to state and federal trafficking crimes. Significantly, it left the definition of § 924(c), which only applies to federal crimes, unchanged.[15]

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and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(1), 105 Stat. 1733, 1751.

[15] In enacting the 1990 amendment, Congress expressed its approval of the ultimate outcome of a BIA decision, *Matter of Barrett*, 20 I. & N. Dec. 171 (BIA 1990). In that case, the BIA construed § 1101(a)(43)(B) to extend to state controlled substance trafficking offenses. But while Congress approved of the ultimate *effect* of the BIA opinion, Congress clearly did not approve of the BIA's *reasoning* (*i.e.*, "that the definition of 'drug trafficking crime' . . . encompasses state convictions for crimes," *id.* at 177-178). Had Congress approved of the BIA's reasoning and agreed with the BIA that the clause "drug trafficking crime" reached state offenses, there would have been no need to add a new clause—"illicit trafficking"—into § 1101(a)(43)(B)'s statutory definition.

* * *

As demonstrated by its plain language, the statutory context, and its statutory evolution, § 924(c)(2)'s definition of a "drug trafficking crime" only covers *federal* crimes.[16] Thus, while "illicit trafficking" in a controlled substance encompasses both state and federal trafficking crimes, a "drug trafficking crime" as defined by § 924(c) only refers to the *federal subset* of trafficking offenses.

CONCLUSION

Petitioners' state-law convictions for possession of controlled substances do not constitute "illicit trafficking in a controlled substance" or a "drug trafficking crime" within the meaning of 8 U.S.C. § 1101(a)(43)(B). Accordingly, Petitioners were improperly denominated "aggravated felons." The judgments of the United States Courts of Appeals for the Eighth and Fifth Circuits should be reversed.

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[16] Indeed, § 924(c) captures all federal trafficking offenses: § 924(c)(2) defines a "drug trafficking crime" by reference to felonies, and under federal law, all federal trafficking crimes are felonies. In contrast, virtually all first-time drug possession offenses are classified not as felonies, but as misdemeanors. *See* 21 U.S.C. § 844(a).

It is true that, under the CSA, possessing a mixture or substance that contains more than five grams of cocaine base constitutes a felony, as does possession of flunitrazepam. 21 U.S.C. § 844(a). While it could be argued that Congress deemed such offenses trafficking crimes, the better argument is that such offenses are not "drug trafficking crime[s]" for purposes of § 1101(a)(43)(B). The broader clause, "illicit trafficking," limits what constitutes a "drug trafficking crime" for purposes of § 1101(a)(43)(B): A "drug trafficking crime" without any trafficking nexus falls outside § 1101(a)(43)(B)'s scope. *See Dolan* v. *United States Postal Serv.*, 126 S. Ct. 1252, 1257 (2006) (recognizing that a word's meaning may be limited by the terms that precede it); *see also, e.g., Chickasaw Nation*, 534 U.S. at 85 (refusing to give Congress's reference to "chapter 35" full effect because the reference to "chapter 35" was prefaced by the word "including" and was therefore circumscribed by the remainder of the subsection); *Young*, 315 U.S. at 259-260 (concluding that the clause "dispensing physicians," prefaced by the word "including," was limited by the preceding terms).

Respectfully submitted.

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JOSE ANTONIO LOPEZ,
Petitioner,
v.
ALBERTO R. GONZALES,
Respondent.

REYMUNDO TOLEDO-FLORES,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the
United States Courts of Appeals for the Eighth and Fifth Circuits

BRIEF OF TEXAS, ARKANSAS, COLORADO, DELAWARE, IDAHO, KANSAS, NEW HAMPSHIRE, PENNSYLVANIA, UTAH, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether prior state convictions for possession of a controlled substance constitute "aggravated felon[ies]" triggering (1) a recommended sentence enhancement under §2L1.2(b)(1)(C) of the Sentencing Guidelines or (2) negative immigration consequences under the Immigration and Naturalization Act when the prior conviction was a felony under state law but would have been a misdemeanor under federal law.

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INTEREST OF *AMICI CURIAE*

No values are more central to the States than the preservation of law and order and the protection of the health and safety of the citizenry. Immigration policy embodies both. The States are united in welcoming legal immigrants to the melting pot that is America, while at the same time valuing a true and secure national border.

Enforcement of criminal laws has likewise traditionally been a core function of the States. *See, e.g.*, THE FEDERALIST No. 45 (James Madison) (Clinton Rossiter ed., 1961). And all of these state interests converge with respect to the illegal immigration of previously adjudged felons. Indeed, the States' interests are at their zenith concerning those individuals who have been found, under state law, to be felons. In proscribing and defining conduct as felonious, state legislatures have made the policy judgment that such conduct is the most objectionable and dangerous to the citizenry, and that normative judgment by the States is due considerable respect. Every State has a vital interest in securing our Nation's borders, including against the illegal immigration of aggravated felons.

Although recent years have seen a significant proliferation of federal criminal laws, particularly concerning the use and sale of drugs, the federal government lacks the resources to investigate and prosecute the full spectrum of criminal offenses. This function remains largely the province of the States.

When Congress wishes to account for individuals' past criminal behavior in making certain criminal or regulatory determinations, it cannot do so comprehensively without relying on state as well as federal convictions. Therefore, Congress increasingly incorporates consideration of state convictions into the scope and application of federal criminal and regulatory laws. In so doing, Congress may, as a matter of comity and efficiency, infuse federal law with the States' policy and normative judgments. This approach can be viewed as a natural outgrowth of increasing the federalization of

criminal and regulatory law while respecting the structure of our system of federalism.

This appeal involves two areas—sentencing enhancement and immigration—in which Congress has taken such an approach, choosing to rely on state convictions and state determinations as to the severity of the particular crime (felony or misdemeanor). The States have a strong interest in ensuring that their normative criminal-law judgments are respected as Congress intended.

These federalism concerns are particularly acute when the States have chosen to exercise their traditional police powers to label someone a "felon." This classification represents the States' most severe assessment of criminal conduct and is reserved for those individuals whom the States believe pose the highest degree of danger to their citizens. Although some States may differ as to whether individuals found in possession of cocaine or marijuana fall within this category, Congress has decided to give effect to each State's policy decision, the objective of which is to protect its citizens from the dangers it believes are posed by a certain category of criminals.

STATEMENT

In 1988, Congress amended the Immigration and Nationality Act ("INA") to define a new class of aggravated felonies to determine the immigration consequences for aliens convicted of criminal offenses. Pub. L. No. 100-690, 102 Stat. 4181 (1988). The Federal Sentencing Guidelines similarly rely upon aggravated felonies to determine recommended sentence enhancements for some federal crimes. U.S.S.G. §2L1.2 (b)(1)(c).

The competing interpretations advanced by the parties as to which offenses Congress intended to be included as aggravated felonies can be distilled into two approaches: (1) the State Felony approach, which would give effect to a State's felony classification,

even if not mirrored by federal law, and (2) the Federal Felony approach, which would treat a state conviction as an aggravated felony only if the conviction would have been a felony under federal law. A brief description of the relevant federal statutes sheds additional light on these two approaches.

Under the Federal Sentencing Guidelines, aggravated felonies provide a baseline for sentencing enhancement:

> If the defendant previously was deported, or unlawfully remained in the United States, after a conviction for an aggravated felony, increase by 8 levels. U.S.S.G. §2L1.2 (b)(1)(c).

Under the INA, commission of an aggravated felony subjects an alien to deportation and also makes him ineligible for suspension of deportation and other equitable remedies available to other aliens. 8 U.S.C. §§1227(a)(2)(A)(iii) (deportation); 1229b (cancellation of removal); 1158(b)(2)(B) (ineligibility for asylum); 1229c(a)(1) (disqualification for voluntary departure).

Aggravated felonies serve distinct purposes in the Guidelines and the INA. Nonetheless, their definitions merge when the Guidelines define an aggravated felony by reference to the INA:

> For purposes of subsection (b)(1)(c), "aggravated felony" has the meaning given that term in 8 U.S.C. 1101(a)(43), without regard to the date of conviction for the aggravated felony. U.S.S.G. §2L1.2, comment. (n.2).

The INA, in turn, directs the reader to the federal criminal code, but first qualifies its definition by explicitly including state-law offenses:

> [T]he term "aggravated felony" means illicit trafficking in a controlled substance (as defined in section 802 of Title

> 21), including a drug trafficking crime (as defined in section 924(c) of Title 18). 8 U.S.C. §1101(a)(43)(B).
>
> The term [aggravated felony] applies to an offense described in this paragraph whether in violation of Federal *or State law*. . . . 8 U.S.C. §1101(a)(43) (emphasis added).

Because the INA includes a "drug trafficking crime" as an aggravated felony, this dispute centers around the federal criminal code's definition of a drug-trafficking crime as:

> any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*). 18 U.S.C. §924(c)(2).

This provision concerns sentencing enhancement for defendants carrying a firearm during a drug-trafficking crime. *Id.* §§924(c)(1); 924(c)(5). The Controlled Substances Act, which §924(c)(2) specifically incorporates, defines a felony as "any Federal *or State* offense classified by applicable Federal *or State law* as a felony." 21 U.S.C. §802(13) (emphases added).

Thus, under the Federal Felony approach, courts classify state-law convictions as drug-trafficking crimes only if the underlying offense "would be punishable as a felony under the federal Controlled Substances Act." *Gerbier v. Holmes*, 280 F.3d 297, 299 (CA3 2002). Under the State Felony approach, courts interpret a drug-trafficking crime as encompassing "two separate elements: (1) that the offense be punishable under the Controlled Substances Act . . .; and (2) that the offense be a felony" under either state or federal law. *United States v. Restrepo-Aguilar*, 74 F.3d 361, 364 (CA1 1996).

SUMMARY OF THE ARGUMENT

Our Nation must secure its borders, especially against convicted felons who enter illegally. National security and the rule of law require no less. Federal law therefore imposes serious penalties upon previously adjudged felons who choose to enter the country illegally. And that federal law should in turn be read to incorporate the standards of the prior state-law convictions, and to respect the policy judgments of state legislatures that have proscribed certain conduct as felonious.

To the maximum extent possible, federal law should be presumed to incorporate preexisting state-law standards. In support of the State Felony approach, the *amici* States set forth practical and structural reasons why Congress reasonably elected to incorporate state-law felony classifications into federal-law determinations concerning sentencing enhancement and immigration.

The first reason is comity. The State Felony approach effectuates the States' policy judgments to classify as felonies the crimes they consider to be the most serious within their jurisdictions. It therefore furthers the important interests of comity and cooperative federalism.

The second reason is efficiency. The Federal Felony approach requires federal courts to expend considerable judicial resources in performing a detailed comparative analysis of the state conviction and any potentially analogous federal offenses. This analysis can entail examination of state law at the time of the conviction as well as the state-court record, including transcripts, indictments, and plea agreements. The State Felony approach, in contrast, avoids this fact-intensive inquiry by simply deferring to the State's felony classification, which is evident on its face.

Because significant disparities in outcomes already inhere in our system of criminal adjudication, the State Felony approach's

advantages of comity and efficiency outweigh any marginal decrease in uniformity that might result. These considerations reasonably led Congress reasonably to select the State Felony approach instead of the Federal Felony approach.

ARGUMENT

I. CONGRESSIONAL INCORPORATION OF STATE LAW SHOULD BE PRESUMED TO BE COMPLETE.

When Congress chooses to incorporate state law, courts should presume that federal law absorbs state law in its entirety, absent unambiguous evidence to the contrary. For example, in *Robertson v. Wegmann*, 436 U.S. 584, 592-93 (1978), the Court held that, because 42 U.S.C. §1988 incorporates state law, courts must apply that state law in its entirety unless inconsistent with federal law or the Constitution. This approach makes sense. Courts should not expect Congress to speak to each individual aspect of the state law that is incorporated.

Of course, Congress is free to include or exclude specific portions of state laws from federal law as it desires. But if Congress makes a general incorporation, courts should presume it is complete. This approach obviates guesswork as to Congress's intent while affording proper respect to States' policy decisions. *Lehman Bros. v. Schein*, 416 U.S. 386, 393-94 (1974) (Rehnquist, J., concurring) (recognizing the importance of cooperative federalism and comity in our federal system). Accordingly, to the maximum extent possible, federal law should be presumed to incorporate preexisting state-law standards.

In the instant cases, federal law expressly and repeatedly refers to and incorporates state law. As with all statutory interpretation, the text should of course be the touchstone for the Court, and the parties will no doubt devote considerable energy to making the careful textual and structural analysis necessary to demonstrate the

proper reading of "aggravated felony." Rather than rehash those textual arguments, and the legislative history on either side, the *amici* States will instead focus on two overarching legislative interests that underlay Congress's reasonable choice to incorporate state-law definitions of "felony."

II. THE MOST REASONABLE READING OF THE FEDERAL LAW AT ISSUE IS THAT CONGRESS CHOSE THE STATE-FELONY APPROACH BECAUSE IT ADVANCES IMPORTANT FEDERAL INTERESTS IN EFFICIENCY AND COMITY.

A. The State Felony Approach Is More Efficient Than the Federal Felony Approach and Would Respect States' Policy Decisions Regarding the Severity of Crimes Committed Within Their Jurisdictions.

The State Felony approach gives effect not only to state convictions but also to the States' policy determinations to treat certain crimes as felonies.[1] By respecting States' normative judgments, the State Felony approach advances comity and "cooperative federalism," which are important considerations "inherent in a federal system," *Lehman Bros.*, 416 U.S., at 393-94 (Rehnquist, J., concurring).

Concerns about comity are especially appropriate in the criminal-justice arena. Traditionally, the States have assumed the primary role in administering criminal justice. *Abbate v. United States*, 359 U.S. 187, 195 (1959) ("The States under our federal

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1. Deference can be given to the States' felony classification by either (1) adopting a State's designation of an offense as a felony, or (2) considering as a felony any conviction for which the maximum term of imprisonment under state law was more than one year, *see generally* Br. of United States.

system have the principal responsibility for defining and prosecuting crimes."); *see also Screws v. United States*, 325 U.S. 91, 109 (1945) (noting that federal system places administration of criminal justice with States except as Congress may exercise its delegated powers to create federal offenses); *Jerome v. United States*, 318 U.S. 101, 104-05 (1943) (same). And States process the lion's share of the nation's criminal offenders. *See* 1 WAYNE R. LAFAVE *ET AL.*, CRIMINAL PROCEDURE §1.2(b) (1999 & Supp. 2005) (arguing that the federal criminal justice system is a "bit player" compared to the States).

States have also played an important role in immigration regulation. One commentator has described immigration law in the first century of our country's history as "a complex hybrid of state and federal policy":

> Federal decision-makers validated certain local policies. [] Supreme Court Justices assigned some categories of immigration regulation to state police power in language that indicated approval rather than indifference; and the Executive urged foreign governments to respect policies whose only statutory embodiment was in state law. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1896-97 (1993).

In light of this situation, Congress's choice of the State Felony approach was eminently reasonable as the scheme that would best advance the "important considerations" of comity and cooperative federalism. *Lehman Bros.*, 416 U.S. at 393-94 (Rehnquist, J., concurring).

There is an even more practical consideration that undergirds the reasonableness of Congress's choice to employ the State Felony approach: conservation of judicial resources. Under the Federal Felony approach, courts must undertake a detailed comparative

analysis of the respective criminal codes to ascertain whether the state conviction would warrant felony treatment under federal law. *See generally* Wayne A. Logan, *Horizontal Federalism in the Age of Criminal Law Interconnectedness*, 154 U. PA. L. REV. 257, 269 (2005) (discussing States' treatment of convictions from other jurisdictions).

In contrast, under the State Felony approach, courts give dispositive effect to the State's felony characterization, avoiding the difficult case-by-case comparative analysis characterizing the Federal Felony approach.[2]

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2. Of course, that state-defined "felonies" would be deemed felonies under the federal immigration laws does not necessarily imply the obverse. Indeed, the State Felony approach is altogether compatible with concluding that state misdemeanors that would themselves constitute felonies under the federal statutes listed in §924(c)(2) will also constitute aggravated felonies under federal immigration law. 8 U.S.C. §1101(a)(43)(B). Thus, courts may possibly be required to analyze state misdemeanor convictions to determine whether they would be treated as felonies under federal law. This policy decision by Congress could well be seen as a compromise between the interests of comity and efficiency and Congress's desire to be increasingly comprehensive in imposing criminal and immigration sanctions, *see e.g.* H.R. Conf. Rep. No 101-955, at 132 (1990), reprinted in 1990 U.S.C.C.A.N. 6784, 6797 (stating that purpose of Immigration Act of 1990 was to broaden list of "serious crimes." with immigration consequences), coupled with its desire to impose greater sanctions than States may have chosen for certain crimes, *cf.* Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 CORNELL L. REV. 1411, 1457 (2005) (describing the enactment of the Lautenberg firearms ban, which extended federal gun control laws to individuals convicted of misdemeanor domestic abuse because of concern that many States did not punish domestic abusers as felons).

The analysis required by the Federal Felony approach can prove very difficult given the complexity of modern criminal codes, with outcomes turning on such questions as whether there is a federal-law analog to a particular state offense, and, if so, whether the elements of each offense are sufficiently similar. This "requires adjudicators to engage in an often-convoluted hypothetical analysis that can be difficult to apply in practice." *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 397-98, 2002 WL993589 (B.I.A. 2002). Moreover, the task is further complicated by the need to identify and construe the state criminal law in effect when the predicate conviction was obtained, which could require review of hard-to-find historic criminal codes. Logan, 154 U. PA. L. REV., at 271. The analysis could conceivably extend to examining the propriety of the state conviction itself. *Cf. Gerbier*, 280 F.3d, at 316-17 (analyzing whether state drug conviction was accompanied by procedural safeguards equivalent to those that would have been provided in federal court when used in sentence enhancement).

To determine whether a particular state conviction would have qualified as a federal felony, courts may also be required to examine the evidentiary record, such as accusatory instruments and plea transcripts. "This evaluative task itself can be quite difficult because the records supporting pleas or convictions (themselves often aged) are frequently ambiguous or incomplete." Logan, 154 U. PA. L. REV., at 272. In the comparable context of interstate analyses, New York's highest court has opined, "[d]etermining whether a particular out-of-State conviction is the equivalent of a New York felony may involve production and examination of foreign accusatory instruments and, conceivably, the resolution of evidentiary disputes, all in the context of comparisons with the law of other jurisdictions." *People v. Samms*, 731 N.E.2d 1118, 1122 (N.Y. 2000). This case presents a prime example of this burdensome inquiry: whether Lopez's conviction for possession of cocaine would have been a felony under federal law is unclear from

the face of the record because the state court documents do not reveal the form or amount of the cocaine, upon which the federal-felony classification would depend. Gonzales Resp. Br., at 4 n.3.

States are familiar with the choice Congress confronted between the Federal Felony and State Felony approaches. In applying their own recidivist sentencing regimes, States themselves had to decide how to account for prior convictions from other jurisdictions. Twenty-eight States employ systems similar to the Federal Felony approach, which requires substantive analysis of the other State's conviction to determine whether it satisfies the forum State's sentencing enhancement scheme. Logan, 154 U. PA. L. REV., at 269. Twenty-one States (and the District of Columbia) use an analog to the State Felony approach when assessing convictions from other jurisdictions. *Id.*, at 277. Under this approach, dispositive importance attaches to how the other jurisdiction treated the earlier conviction. If it was a felony in the convicting jurisdiction, the forum State will consider it for enhancement, even if the offense would not have been a felony in the forum State and thus would not trigger enhancement if it had been committed there. *Id.* The fact that a significant number of States have chosen the analog to the State Felony approach supports the conclusion that Congress's decision to select that same approach was eminently reasonable and appropriately reflective of comity and cooperative federalism.

B. Any Marginal Decrease in Uniformity That the State Felony Approach Might Cause Is Outweighed by Its Substantial Efficiency and Comity Advantages.

The principal criticism of the State Felony Approach is that its reliance on differing state laws can lead to disparate outcomes for individuals who engaged in similar conduct. For example, a defendant convicted of a felony under state law for conduct that would have been a misdemeanor under federal law would be

considered an aggravated felon, whereas a defendant convicted for the same conduct, but in a State that considered such conduct a misdemeanor, would not be treated as an aggravated felon.

Petitioners and their *amici* argue that Congress cannot have intended such disparate results. *E.g.* Toledo-Flores Br., at 39-41; Lopez Br., at 33-36. But the ideal of uniformity that these parties attribute to Congress does not reflect the realities of criminal adjudication in our country.

Diverse outcomes inhere in our system of criminal adjudication. Mikos, 90 CORNELL L. REV., at 1428 & n.48. This occurs in part because all criminal convictions—whether state or federal—result from multiple discretionary decisions made by prosecutors, defendants, and juries. The most obvious example of similarly situated defendants receiving different outcomes is when two co-defendants are charged with the same crime, and one makes a plea bargain with prosecutors while the other is tried before a jury. Disparate results—as to the crime for which each defendant is convicted and the punishment each defendant receives—are virtually guaranteed in this instance.

Prosecutors exercise great discretion when making charging and plea-bargaining decisions. Various factors influence these decisions, including allocation of scarce prosecutorial and investigative resources and the desire to ensure that the punishment fits the crime.[3] These factors take on heightened importance in circumstances—such as immigration—where a state conviction can

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3. Prosecutors have a duty "to seek justice, not merely to convict." Standards for Criminal Justice 3-1.2(c) (3d ed. 1993), available at WL SCJ 3-1.2; *see also* National Prosecution Standards §§43.6, 44.4, 68.1 (Nat'l Dist. Attorneys Ass'n, 2d ed. 1991) (encouraging prosecutors to consider the collateral consequences of conviction when making charging decisions).

lead to a supplemental federal sanction such as deportation. *See generally* Mikos, 90 CORNELL L. REV., at 1422-32.

Because the potential federal sanction of deportation is a significant consideration for an alien defendant, he may be less likely to accept a plea bargain that would subject him to that penalty. Conversely, prosecutors do not have the resources to try every case, and they may believe that the supplemental federal sanction is too harsh a punishment for the defendant's conduct. Thus, prosecutors have an incentive to offer such defendants plea bargains for lesser offenses than their conduct might ordinarily warrant. *Id.*, at 1426-27.

These factors may affect hundreds of thousands of cases every year. In 2003 alone, almost 80,000 aliens were deported because of criminal convictions, and most of these crimes were prosecuted by the States. *Id.*, at 1413. Moreover, drug crimes—like those at issue here—account for almost half of all criminal alien deportations. *Id.*, at 1445 & n.96. Therefore, the nature of our system of criminal enforcement—especially when aliens are accused of drug crimes—means that similarly situated defendants would have experienced disparate outcomes regardless of whether Congress had adopted the State Felony Approach or the Federal Felony Approach.

Moreover, and fundamentally, two defendants who committed the same crime in different States that differ as to the felony status of that particular conduct are not similarly situated: one is a felon, and the other is not. That is a distinction with consequence—and one on which the state legislatures can legitimately disagree—and it is altogether reasonable for Congress to give federal force and effect to state-law felony convictions, even if the conduct may not have been a felony in other States.

In other words, when Congress decided to adopt a statutory scheme that based current punishment on past state and federal convictions, it necessarily accepted the potential for heterogeneous

results intrinsic to the criminal adjudicatory system. Given this acquiescence, it would be unreasonable to assume that Congress rejected the State Felony approach because it introduced some added potential for disparate results. Congress reasonably decided to trade a marginal decrease in uniformity[4] for the considerable advantages in efficiency and comity afforded by the State Felony approach. *See* Part I.A., *supra*.

Adjudicating a criminal defendant as a felon is one of the most portentous determination a State can make. Congress reasonably chose to respect those state-law determinations, and to enact severe penalties to prevent the illegal immigration of aggravated felons. This Court should give force that congressional decision, and accordingly hold that individuals adjudged felons by state law are subject to the full penalties of federal immigration law.

CONCLUSION

The Court should affirm the judgments below.

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4. Congress's incorporation of state law in this context does not violate Article I, §8 of the Constitution. *See* U.S. CONST., art. I, §8 ("The Congress shall have Power . . . To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States."). The Court has upheld a federal bankruptcy provision that defined exempt assets with reference to state law. *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181 (1902). The Court described the uniformity requirement as "geographical" not "personal" and held that "[t]he general operation of the law is uniform although it may result in certain particulars differently in different states. *Id.*, at 190. The same result applies here.

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Per Curiam

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SUPREME COURT OF THE UNITED STATES

No. 05–7664

REYMUNDO TOLEDO-FLORES, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[December 5, 2006]

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

It is so ordered.